Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Regulatory Policy CRTC 2023-331 and Broadcasting Order CRTC 2023-332

PDF version

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Ottawa, 29 September 2023

Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings

Summary

In this regulatory policy, the Commission sets out conditions of service relating to information gathering, undue preference and undue disadvantage, making content available over the Internet and filing financial information, to be imposed on online undertakings.

The condition of service relating to information gathering will apply to all online undertakings, with the exception of online undertakings whose single activity and purpose consists either of providing video game services or of providing audiobook services.

The conditions of service relating to undue preference and undue disadvantage, making content available over the Internet and filing financial information will apply to online undertakings that either alone, or as part of a broadcasting ownership group, have $10 million or more in annual broadcasting revenues in Canada.

For the sake of clarity, users that upload content on social media platforms are not subject to the *Broadcasting Act* and therefore will not need to comply with these conditions of service.

Further, the Commission has repealed the Exemption order for digital media broadcasting undertakings (known as the DMEO), set out in the appendix to Broadcasting Order 2012-409, as of the date of this regulatory policy. The Commission has, however, maintained the exemption order for video-on-demand undertakings (known as the VODEO), set out in Appendix 1 to Broadcasting Regulatory Policy 2015-355, in particular, paragraphs 12 through 15 of that exemption order, with an amendment to the wording of paragraph 14 to mirror the wording of the new condition of service relating to information gathering.

Canada

Introduction

1. On 27 April 2023, the *Online Streaming Act* came into force.[1] This Act includes, among other things, amendments to the *Broadcasting Act* to account for the impact that Internet audio and video[2] services have had on the Canadian broadcasting system. The amended *Broadcasting Act* provides the Commission with clear powers and tools to, among other things, regulate certain online undertakings operating in whole or in part in Canada, regardless of their country of origin, when they are operating as "broadcasting undertakings".[3] As set out in the *Broadcasting Act*, "online undertaking" means "an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus."

2. Pursuant to subsection 2(1) of the *Broadcasting Act*, the definition of "broadcasting undertaking" includes a distribution undertaking, an online undertaking, a programming undertaking and a network.

3. Under the previous version of the *Broadcasting Act*, in order to legally operate in whole or in part in Canada, a broadcasting undertaking was required to either be licensed by the Commission or be exempted from the obligation to hold a licence by way of an applicable exemption order. However, under the recently amended *Broadcasting Act*, a person may carry on a broadcasting undertaking online (referred to as an "online undertaking") without a licence and without being so exempted. Such undertakings may now lawfully operate in Canada without having to adhere to the existing exemption order.

4. Notwithstanding the above, the Commission is able to impose certain obligations on online undertakings via regulations or via new order-making powers. As stated by the Commission in Broadcasting Information Bulletin 2023-137, orders that impose conditions under section 9.1 of the current *Broadcasting Act* are referred to as "conditions of service." Conditions of service constitute a flexible tool that can be imposed following a public proceeding, and that can apply to all undertakings, a class of undertakings, or a particular undertaking.

5. Prior to the recent amendments to the *Broadcasting Act* coming into force, online undertakings were referred to as digital media broadcasting undertakings (DMBU), and operated in accordance with the Exemption order for digital media broadcasting undertakings (the DMEO), set out in the appendix to Broadcasting Order 2012-409. In addition, certain video-on-demand (VOD) undertakings

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[1] *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, SC 2023, c 8.

[2] The term "video" is used in this regulatory policy, whereas the term "audio-visual" is used in the former *Broadcasting Act*.

[3] Prior to the amendments, in order to legally operate in whole or in part in Canada, a broadcasting undertaking was required to be either licensed by the Commission or exempted from the obligation to hold a licence by way of an exemption order. Under the current *Broadcasting Act*, to legally operate in Canada, online undertakings no longer need to hold a licence or be exempt from holding a licence.

operated pursuant to the exemption order for VOD undertakings (VODEO) (Broadcasting Order 2015-356, set out in Appendix 1 to Broadcasting Regulatory Policy 2015-355).

6. In both cases, the Commission exempted these undertakings from all requirements under Part II of the *Broadcasting Act*, including licensing obligations, provided that they complied with all conditions set out in the applicable exemption orders. However, given that online undertakings no longer require a licence to operate in Canada, the Commission sought comments on whether the DMEO and paragraph 12 through 15 of the VODEO continue to be the appropriate tools for regulating these undertakings. Further, the Commission sought comments on whether the DMEO remains relevant for any other broadcasting undertakings.

7. It is the Commission's view that some basic regulatory oversight for online undertakings should be maintained until the numerous issues that will need to be dealt with as a result of the changes to the *Broadcasting Act* can be more fully addressed. Such oversight would serve to improve the regulatory symmetry between online undertakings and licensed broadcasters.

8. In light of the above, on 12 May 2023, the Commission issued Broadcasting Notice of Consultation 2023-140 (the Notice), in which it called for comments on the following:

    - the need to amend, replace or repeal current exemption orders for undertakings that would count as online undertakings under the current *Broadcasting Act*; and

    - the need for an order, pursuant to subsection 9.1(1) of the current *Broadcasting Act*, to impose certain conditions on online undertakings, and the content of the order.

9. In Broadcasting Notice of Consultation 2023-139, which was issued the same day as the Notice, the Commission called for comments on proposed *Online Undertakings Registration Regulations* (the Registration Regulations) and on an exemption order regarding those regulations. The Commission's goal in regard to that proceeding related to collecting basic but sufficient information about online undertakings operating in the Canadian broadcasting market to achieve various policy objectives of the *Broadcasting Act*, while exempting smaller online undertakings from the requirement to register.

10. Also, in Broadcasting Notice of Consultation 2023-280, which was issued 23 August 2023, the Commission called for comments on proposed new *Broadcasting Fees Regulations*, which would replace the current *Broadcasting Licence Fee Regulations, 1997*.

11. In the sections that follow, the Commission addresses issues relating to the following:

- the status of the DMEO;
- the status of the VODEO;
- new conditions of service for online undertakings currently operating under the DMEO; and
- the online undertakings that should be subject to those conditions of service.

12. The Commission wishes to thank all those who participated in this proceeding. The thoughtfulness and clarity reflected in the written submissions greatly assisted the Commission in its deliberations.

Exemption order for digital media broadcasting undertakings (DMEO)

13. The DMEO covers undertakings that provide broadcasting services that are either delivered and accessed over the Internet, or delivered using point-to-point technology[4] and received by way of mobile devices. Undertakings that wish to operate pursuant to the DMEO must comply with various conditions of exemption set out in the appendix to Broadcasting Order 2012-409.

14. As noted above, the Commission considers that under the current *Broadcasting Act*, the DMEO is no longer the appropriate tool for regulating online undertakings, and questions whether the DMEO remains relevant for any other broadcasting undertakings. For example, the Commission is not aware of any broadcasting undertakings providing broadcasting services that are using point-to-point technology and that are received by way of mobile devices as the reference to point-to-point technology was meant to cover older, now largely defunct technology. In the Notice, the Commission sought comments on whether the DMEO should be repealed or amended, and on whether there are broadcasting undertakings, other than online undertakings, for which the DMEO may still be relevant.

Positions of parties

15. Certain interveners supported simply repealing the DMEO, with some specifying that it is no longer the appropriate tool for regulating online undertakings, as they are now subject to the *Broadcasting Act*.[5] AMC Networks Inc. (AMC) stated that repealing the DMEO would work towards ensuring that online undertakings are captured by a single regulatory framework, and would avoid the application of conflicting or duplicative conditions to online undertakings. Roku, Inc. (Roku)

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[4] As explained in the Notice, "point-to-point" is a broad term that encompasses multiple types of technologies. It could refer to a wireless data link, connectivity through a local network, or a client-server connection.

[5] Canada Media Fund, Fédération culturelle canadienne-française, Spotify, Sirius XM Canada Inc.

stated that there is no reason to impose regulatory obligations on these classes of online undertakings through the DMEO, where doing so is not material to the policy objectives set out in the *Broadcasting Act*.

16. Most interveners, however, submitted that the DMEO should be replaced or amended. In this regard, certain interveners proposed that services currently subject to the DMEO be subject instead to conditions of service under the *Broadcasting Act*.[6] According to the Canadian Association of Broadcasters (CAB) and the Documentary Organization of Canada (DOC), the DMEO could be repealed so long as some provisions (for example, those setting out rules and conditions relating to information gathering, undue preference and disadvantage, and making content available over the Internet) were incorporated into conditions of service. The Conseil provincial du secteur des communications du Syndicat canadien de la fonction publique (CPSC-SCFP) submitted that there should be a step-by-step transition plan if the DMEO were to be repealed.

17. Other interveners proposed that the DMEO be repurposed to serve as a new exemption order. The Public Broadcasting Service (PBS) proposed creating a new DMEO that reflects the current *Broadcasting Act* and any policy direction to the Commission. TELUS Communications Inc. (TELUS), referring to the proceeding initiated by Broadcasting Notice of Consultation 2023-139, proposed repurposing the DMEO to serve as an exemption order for small online undertakings that meet the same threshold for exemption from the requirement to register with the Commission. It added that these undertakings should be subject to fewer regulatory obligations due to their size.

18. Many interveners considered that some of the provisions in the DMEO are worth keeping. Google LLC (Google) stated that the Commission should implement the least intrusive regulatory obligations and ensure that such obligations can accommodate the unique nature of online undertakings. Meta Platforms Inc. (Meta) stated that the possibility of amending the DMEO is difficult to discuss without a clear definition of online undertaking and its scope.

19. A smaller number of interveners submitted that the DMEO should be maintained, with some arguing that it is the best and most effective way to regulate online undertakings. An individual intervener argued that it is important for the Commission to maintain a DMEO-like exemption for services delivered over point-to-point connections or other non-Internet connections. This intervener noted that in the future, there may be more point-to-point networks used, and considered that the Commission would need an approach for exemptions to be applied.

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[6] Apple Canada Inc., Rogers Communications Inc., the Digital Media Association, the Forum for Research and Policy in Communications, the Independent Broadcast Group, the Motion Picture Association Canada and Tubi, Inc.

20. The Public Interest Advocacy Centre (PIAC) submitted that the DMEO should be maintained because the transition to the new *Broadcasting Act* will take some time, and that the provisions set out in the DMEO should be kept as safeguards. It added that since subsection 90(3) of the *Broadcasting Act* serves to automatically continue the conditions of exemption set out in the DMEO as conditions of service, the Commission does not need to take any action to preserve the current conditions on online undertakings. PIAC considered that the Commission could simply make a declaration confirming this at the end of the proceeding. The Canadian Media Producers Association (CMPA) took a similar stance and considered that the DMEO should stay in place until the transition period is complete.

21. Corus Entertainment Inc. (Corus) stated that it would support maintaining the DMEO if the undue preference provision continues to apply to all undertakings. Similarly, Cogeco Inc. (Cogeco) considered that the DMEO serves a beneficial purpose if that order maintains that exempt services are still subject to undue preference provisions.

Commission's decision

22. While the DMEO may no longer be the appropriate tool for regulating online undertakings, it is less clear whether the DMEO remains relevant for broadcasting services using point-to-point technology. In the Notice, the Commission stated that it was not aware of any broadcasting undertakings providing broadcasting services that are using point-to-point technology and that are received by way of mobile devices since the reference to point-to-point technology was meant to cover older, now largely defunct technology. Accordingly, one of the objectives of the present proceeding was to establish a public record to inform the Commission whether undertakings other than online undertakings are currently operating under the DMEO.

23. After examining the public record, the Commission considers that the record has not demonstrated that there is a need for maintaining the DMEO for services using point-to-point technology. The sole intervener who supported maintaining the DMEO for point-to-point technology did not express a specific need for an exemption for point-to-point technology, but instead indicated that there may be a possibility in the future that networks could be deployed over point-to-point or point-to-multi-point technology.

24. Accordingly, the Commission does not consider that there is a need to maintain the DMEO, and repeals the DMEO as of the date of the present regulatory policy. In regard to interveners who expressed the need for some form of rules and regulations for online undertakings to follow, the Commission considers it appropriate to maintain certain obligations, as described below, as a means of ensuring continued regulatory oversight.

Exemption order for video-on-demand undertakings (VODEO)

25. As noted in Broadcasting Regulatory Policy 2015-355, VOD undertakings had historically (i.e., prior to 2015) been offered by broadcasting distribution undertakings (BDU) (e.g., cable companies) under a VOD licence; as undertakings operated by smaller, independently owned BDUs under the exemption order for small VOD undertakings (Broadcasting Order 2011-60); or as online video undertakings operating under the DMEO.

26. BDU-operated VOD undertakings are subject to specific requirements relating to the provision of Canadian programming that are similar to those for licensed programming services. As more and more VOD undertakings were seeking to offer their services online, the Commission, in Broadcasting Regulatory Policy 2015-355, expanded the exemption order for small VOD undertakings to authorize a third category of VOD undertakings (in addition to licensed and exempt VOD undertakings) based on a more flexible, hybrid approach. These are known as hybrid VOD (HVOD) undertakings.[7]

27. The Commission's intent in exempting HVOD undertakings was to allow them to benefit from the same flexibility as undertakings operating under the DMEO, including the ability to offer exclusive programming (if it is offered in a manner that is not dependent on a subscription to a specific BDU, mobile or retail Internet access service). HVOD undertakings can also provide their programming on a closed BDU network, similar to traditional VOD undertakings, without having to meet the specific regulatory requirements relating to financial contributions and to the availability of Canadian programming that are applicable to traditional VOD undertakings.

28. Under the VODEO, HVOD undertakings could operate without a licence provided that they adhered to a number of criteria, specifically those set out in paragraphs 12 through 15, which relate specifically to the online portion of an HVOD's service. In the Notice, the Commission considered that it would be useful to examine paragraphs 12 through 15 of the VODEO to determine whether they should be repealed or amended, insofar as they apply to online undertakings, and if they are repealed, whether HVOD undertakings should be treated in the same manner as other online undertakings. HVOD undertakings are unique in that they offer their services both over the Internet and on a closed BDU network. As such, in the Notice, the Commission indicated that it is not entirely clear that HVOD undertakings fall within the definition of "online undertaking" set out in the current *Broadcasting Act*.

[7] At this time, the Commission is aware of three undertakings that have registered as HVODs – Crave (owned by BCE Inc.), and Club Illico and Vrai (both owned by Quebecor Media Inc. and operated through its Videotron BDU).

Positions of parties

29. Certain interveners proposed that the VODEO, or portions of that exemption order, should be repealed. Rogers Communications Inc. (Rogers) stated that paragraphs 12 to 15 of the VODEO should be repealed and that HVOD services should no longer be considered a distinct class of undertaking. It considered that continuing that framework would be unfair treatment vis-à-vis those traditional VOD and online undertakings that do not operate as HVOD undertakings under the VODEO.

30. BCE Inc. (BCE) stated that the concept of HVOD undertaking is no longer necessary, and that these services should be treated like other VOD services. It added that there is no reason why they should be exempt when all the other services are regulated, and that a BDU offering HVOD services should be required to have a licence to offer the services on linear television. It added that if the services are only offered online, then they should be treated as online undertakings and be subject to conditions of service.

31. The CMPA stated that there is no reason to treat HVOD undertakings differently than online undertakings. It considered that elements of the VODEO pertaining to HVOD undertakings should therefore be repealed, and that these undertakings should be subject to the same requirements for contributing to the Canadian broadcasting system that apply to other undertakings. The CMPA also proposed that the Commission create a new exemption to solely and specifically maintain existing arrangements already in place (e.g., existing HVOD services offered by BDUs), but added that any such exception should only apply to the continued BDU distribution of these HVOD services.

32. Google did not oppose maintaining paragraphs 12 through 15 of the VODEO to the extent that the VODEO is relied on by services offered in a “closed system.” It noted, however, that these services will become increasingly irrelevant. It further noted that the Commission should clarify if HVOD undertakings qualify as online undertakings. Meta stated that it was difficult to discuss this issue without a clear definition of online undertaking.

33. Other interveners proposed that the VODEO be amended. In this regard, the Forum for Research and Policy in Communications (FRPC) noted that the VODEO no longer references licensed undertakings, and considered that it should be amended and re-issued as conditions of service that apply to all relevant broadcasting undertakings.

34. The Motion Picture Association of Canada (MPAC), supported by Netflix Services Canada ULC (Netflix) and Warner Bros. Discovery (a member of the MPAC), proposed updating and modernizing the VODEO. More specifically, the MPAC stated that the requirements set out in paragraphs 14 and 15, which relate to information gathering and registration, should be no lighter than those that result from the present proceeding and that are applied to online undertakings that are not HVOD services. A continued but amended VODEO was also supported by the DOC.

35. Finally, certain interveners proposed maintaining the VODEO without amendments. Quebecor Media Inc. (Quebecor) stated that paragraphs 12 through 15 of the VODEO should not be repealed, as doing so could have a significant impact on existing HVOD services. More specifically, it argued that the removal of these provisions would constitute a significant reversal of Commission policy and would have very serious consequences for the business model of HVOD undertakings. Quebecor submitted that if these provisions are repealed, the Commission must remove the prohibition on offering exclusive programming from the standardized licensing conditions for traditional VOD services. It further submitted that HVOD services do not meet the definition of "online undertaking" as they are available both over the Internet and on the closed network of a BDU.

36. PIAC noted that since subsection 90(3) of the *Broadcasting Act* serves to automatically continue paragraphs 12 through 15 of the VODEO as conditions of service, the Commission does not need to take any action to preserve the current conditions on online undertakings. It added that the Commission could simply make a declaration confirming that point at the end of this proceeding.

37. The Commission notes that there was also some debate among parties as to whether an online undertaking must transmit programs solely over the Internet to be considered an online undertaking. In this regard, Quebecor submitted that its HVOD services Illico and Vrai are not online undertakings because they do not operate solely over the Internet. Other parties considered that an online undertaking need not operate solely online, and that HVOD services are online undertakings and should be treated as such.

Commission's decisions

38. The Commission acknowledges that there was broad support for repealing paragraphs 12 through 15 of the VODEO, including from BCE, whose subsidiary, Bell Media Inc., has a registered HVOD service. Quebecor, which operates two of the three current HVOD services, is of the view that repealing paragraphs 12 through 15 of the VODEO could have a significant impact on its HVOD services. While little evidence was provided as to the extent of that harm, it is clear that should those paragraphs be repealed, the Commission would need to determine how to treat the portions of the HVOD services that are available through a BDU, i.e., either license them as VOD services or issue a new exemption order. If licensed as a VOD service, the service would not be able to offer programs exclusively on its VOD service, and requirements with respect to contributions would be added. In regard to the online portion of existing HVOD services, these would be treated as separate online undertakings.

39. At this time and given its stated intent of maintaining basic regulatory oversight for online undertakings until the changes stemming from the amendments made to the *Broadcasting Act* can be more fully addressed, the Commission finds that it would not be appropriate to repeal paragraphs 12 through 15 of the VODEO. The Commission will continue to treat HVOD services as unique, exempt undertakings, subject to the conditions set out in that exemption order.

40. Consequently, HVOD services will continue to be exempt under the VODEO, at least for the present time, meaning that regulations, conditions of service or other requirements established by the Commission would not apply to these services, unless the HVOD exemption order were amended to include similar provisions. For example, their revenues will not count towards an ownership group's annual revenues for other purposes, such as the requirement to register with the Commission (see Broadcasting Regulatory Policy 2023-329) and the requirement to pay broadcasting fees (see Broadcasting Notice of Consultation 2023-280). The Commission notes, however, that HVOD services are, through conditions of exemption set out in the VODEO, subject to a registration requirement, along with a prohibition against undue preference and a reporting requirement, among others.

41. Certain interveners considered that if the HVOD exemption is maintained, the information gathering requirements set out in paragraph 14 should be amended to reflect updates to the *Broadcasting Act*. In this regard, the Commission notes that it addresses below its proposal set out in the Notice regarding the imposition of a condition of service relating to gathering information from online undertakings. In the Commission's view, the wording of an amended paragraph 14 of the VODEO should mirror the wording of the new condition of service relating to gathering information. Accordingly, the Commission will address the information gathering requirements under the VODEO when it addresses the proposed condition of service below.

42. Notwithstanding its decision to maintain paragraphs 12 through 15 of the VODEO for the time being, the Commission considers that the exemption order as it applies to HVOD services may not be a tool that it will require in the longer term. Accordingly, the Commission intends to revisit the continued need for paragraphs 12 through 15 of the VODEO at some point in the future. The Commission also notes that undertakings may choose to stop operating as an exempt HVOD service at any time, provided the undertakings comply with the applicable licensing requirements and conditions of service.

Conditions of service

43. The Commission has the authority, pursuant to subsections 9.1(1) and 11.1(2) of the *Broadcasting Act* to make orders imposing conditions on the carrying on of a broadcasting undertaking that it considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*, and to make orders respecting expenditures.

44. In the Notice, the Commission expressed the view that it would be appropriate and practical for the conditions of exemption with which online undertakings must currently comply under the DMEO or VODEO to continue, with some adjustments to reflect amendments to the *Broadcasting Act*. In this regard, it proposed to apply specific conditions of service that would replace the conditions of exemption set out in those exemption orders. It noted that applying these conditions of service would be a transitional step until such time as the Commission can determine, through

separate public proceedings, if other conditions of service or regulatory measures ought to be applied to online undertakings. While many interveners also commented in support of maintaining various conditions of service, the Commission notes that its summaries of interveners' comments in the next few sections focus on comments that are opposed to, or proposed changes to, the proposed conditions of service.

45. In the sections to follow, the Commission sets out determinations in regard to the imposition of conditions of service relating to information gathering, undue preference and undue disadvantage, making content available over the Internet, the filing of financial information, the anti-competitive head start rule, and dispute resolution.

Information gathering

46. Under paragraph 4 of the DMEO, an exempt undertaking "submits such information regarding the undertaking's activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time and in such form, as requested by the Commission from time to time."

47. Paragraph 9.1(1)(o) of the *Broadcasting Act* empowers the Commission to impose conditions on broadcasting undertakings, including online undertakings, regarding the collection of information that the Commission considers necessary for the administration of the *Broadcasting Act*, including financial information and information related to programming, expenditures or audience measurement. As such, the requirement underlying paragraph 9.1(1)(o) of the *Broadcasting Act* is broader in scope than the information gathering provision set out in the DMEO, which is limited to monitoring "the development of broadcasting in digital media."

48. In the Notice, the Commission sought comments on a proposed condition of service that would replace paragraph 4 of the DMEO, and would broaden the scope of the requirement set out in that paragraph by requiring online undertakings to provide, in such form and at such time as requested by the Commission, the following types of information:

- information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;[8]

- information regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations, subscribership or financial affairs in Canada;

[8] As stated in paragraph 29 of the Notice, the requirements of the Digital Media Survey, as set out in detail in Broadcasting Regulatory Policy 2022-47, remain in effect.

- information regarding the undertaking's adherence to the conditions of service, the *Broadcasting Act*, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and

- a response to a complaint filed by a person.

Positions of parties

49. Overall, interveners supported the Commission's proposal. Many agreed that it was essential for the Commission to have information on online undertakings to understand the landscape and to have basic knowledge of the online undertakings operating in Canada.

50. Certain interveners submitted that more information than that proposed by the Commission should be captured by the condition of service. For example, the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) considered the information requested insufficient to adequately monitor the broadcasting system given the amount of gathered information that would be confidential. It added that the Commission should make the information available to the public, and stressed the importance of the information being easy to find and consult. In ADISQ's view, the threshold for who should be subject to this condition of service should be sufficiently low to encompass most businesses in the industry, and otherwise, the Commission would not be able to fulfill its responsibility to supervise the broadcasting industry.

51. The Canadian Association of Community Television Users and Stations (CACTUS) and the Fédération des télévisions communautaires autonomes du Québec proposed that online undertakings should provide information to the Commission related to the pass-through of regulatory costs. The DOC proposed that the Commission collect and publish more data relating to when online undertakings began operations in Canada, their operational models, their annual revenues, subscription numbers, whether the service is providing audio-visual works or simply audio works, the amount of Canadian programming available to the public, data about financial performance, language, genre of programming (including whether the undertakings offer programs of national interest such as long-form documentaries), and data about the self-identification of the production team. The ministère de la Culture et des Communications du Québec emphasized the importance of collecting information on each language market and each province and territory, as gathering data about French-language programming would help the Commission in future decision making.

52. The Association québécoise de la production médiatique (AQPM) also considered that the Commission should gather a wide range of data, and that it should be allowed to gather more information in order to execute its mandate.[9] The intervener

[9] The AQPM urged the Commission to continue collecting data on revenues (related to subscriptions, advertising, and transactions), as well as other revenues generated, and costs, advertising, transactions, and subscriptions (subscribers paying the full subscriptions, subscribers paying the full posted rate, those

stated that online undertakings, rather than seeking to minimize the amount of information provided to the Commission, should instead seek to take maximum advantage of the tools and technology in their hands to provide more detailed information. Noting that the Commission's information gathering powers extend beyond its Annual Digital Media Survey (Digital Media Survey), the AQPM considered that the values of transparency and public interest should take precedence over undertakings' confidentiality concerns. In its view, without transparency, industry players do not have the tools to make the decisions they need to make.

53. Conversely, certain interveners submitted that less information should be captured by the condition of service. For example, Google stated that collecting additional personal information from online undertakings beyond what is reasonably necessary for the provision of their services would be contrary to fair information principles, privacy law, and the privacy rights of their consumers. The FRPC stated that information about users should not be collected, that information about revenues should be collected about individual undertakings, and that any registration, exemption or financial support criteria should be based on ownership.

54. Interveners including Apple Canada Inc. (Apple), the Digital Media Association (DiMA) and Quebecor expressed concerns relating to the scope and breadth of the information gathering provision. They argued that the information requested should be minimal and necessary only for the exercise of the Commission's regulatory mandate, to allow it to fulfill its oversight mission and to ensure the compliance of online companies. Roku considered that the scope of the information gathering condition of service should be clarified.

55. Apple added that since the regulatory regime for online undertakings is still being determined, any information requirements should be light in touch and avoid pre-judging the future regulatory framework. In its view, the requirement for an online undertaking to provide information should be limited to the undertaking itself and not extend to information about the market in general.

56. Apple, along with Google, considered the condition of service regarding an undertaking's technical operations or financial affairs to be too broad. Apple proposed that it should either be made more specific or that it should be deleted until the Commission establishes the appropriate regulatory regime for online undertakings. Google, using the Digital Media Survey as a benchmark, considered that information exceeding that collected under that survey or under requirements that are less flexible than the survey should be rejected. It added that the information gathering conditions should be as light as possible to meet the objectives of the regulatory policy in the *Broadcasting Act*.

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paying a reduced rate and those with a free subscription) as it currently does for the Digital Media Survey.

57. The MPAC and Warner Bros. Discovery proposed amendments to the proposed condition of service in order to ensure that online undertakings are only required to provide information directly relevant to their own undertakings and to the extent that information is in their possession, which is necessary for the Commission's regulatory oversight. Similarly, the MPAC submitted that since some broadcasting companies do not have data specific to the broadcasting year (1 September to 31 August), the Commission should maintain the option for these companies to submit data from their closest quarter.

58. Certain interveners, including Google, the MPAC and Netflix, commented on the issue of confidentiality, with some stating that all information and data gathered should be subject to strict confidentiality rules. According to the MPAC, any information the Commission obtains, specifically through the fee provision and information gathering provision, should be treated as strictly and automatically confidential upon receipt of any documentation. According to AMC, the Commission must establish a robust framework to maintain the confidentiality of any information filed by an online undertaking that is designated as confidential or commercially sensitive. For its part, the FRPC proposed that the Commission routinely release aggregated data that does not allow individual undertakings to be identified.

59. Both Google and Apple referred to the Digital Media Survey in regard to strong confidentiality measures. According to Google, adopting the approach used for that survey would "grant full confidentiality, in advance" against any disclosure of individual service level data collected in connection with the information gathered as part of the survey. In Google's view, any information regarding a company's finances should be collected, but only with the guarantee of strict confidentiality. It added that the Commission should also take care to protect personal user information and commercially sensitive information and avoid imposing obligations that would necessitate services to gather new personal information from users and uploaders. Apple stated that the condition of service should be explicit in regard to adhering to confidentiality requirements.

60. An individual intervener considered that the proposal to collect information on the "habits and preferences of online viewers" (see paragraph 28 of the Notice) could end up collecting highly sensitive information and data, which could easily be linked back to the user. The FRPC expressed a similar concern, noting that the wording of the proposal is vague enough that it can be abused to track individuals' more sensitive content consumption. It added that the privacy rights of Canadians need to be prioritized and cannot be allowed to be breached.

61. Finally, interveners including Netflix and AMC expressed concerns regarding the administrative burden that the information gathering condition of service would place on online undertakings. In their view, any information requests must be limited to Canadian operations, revenues, and subscribers. The DiMA stated that information gathering should be limited to a strict minimum to avoid overburdening international companies. In this regard, the Information Technology Industry

Council (ITIC) stated that information sharing standards should be reasonable and take into consideration that many online undertakings operate in global markets, and do not systematically break out information by market. It considered that the information requested and to be provided should relate only to broadcasting activities.

62. An individual intervener submitted that if information gathering on the part of the Commission is part of regulation, it should hinge on language such as "reasonable" or possibly "within reason." It noted the ongoing issues with false metrics and added that accurate metrics may be tough to obtain, given that there is never a foolproof method of gauging something like audience size. It noted that although services such as YouTube may offer analytical information in terms of audience size for individual accounts, it is difficult to assess the accuracy of such numbers given that, on a platform scale, there are ongoing problems of botnets falsely generating views and audience retention on more nefarious accounts. In the intervener's view, one idea could be to offer a method to adjust those statistics on the part of the platform as new information comes to light; otherwise, such an ask may actually be unreasonable.

63. According to Quebecor, the broad scope of the information the Commission proposes to collect may cause an administrative and financial burden already weighing heavily on broadcasting undertakings when they need this burden lifted. Apple qualified as impractical and unduly burdensome the extensive requirements proposed by ADISQ and the AQPM in regard to the collection of information.

64. For its part, the AQPM noted that modern technology has made data collection and analysis significantly easier than it once was, and argued that this exercise, rather than presenting a burden, would simply be part of an undertaking's day-to-day activities.

Commission's decision

65. Although the Commission has determined that it is appropriate to repeal the DMEO, the Commission considers that it should continue to exercise some basic oversight in respect of online undertakings.

66. As the Commission currently relies on paragraph 4 of the DMEO as its authority to collect data under its Digital Media Survey, it finds that imposing a condition of service on online undertakings that maintains the information gathering provisions of the DMEO is necessary to allow the Commission to seamlessly continue administering the survey.[10] Even more importantly, the Commission will rely on such a condition of service for much of the information it may need to collect from online undertakings in at least the near-term future.

[10] In the future, the Commission may expand or modify the requirement to participate in the Digital Media Survey, or the content of that survey.

67. In regard to concerns over the need to collect certain types of information described in the proposed condition of service, it is important to note that the Commission is only authorized to collect information for the sole purpose of exercising its mandate in Canada under the *Broadcasting Act*. Further, in the past, the Commission has always set out the purpose of its requests when making such requests to various parties. The Commission intends to continue this practice.

68. The proposed condition of service is somewhat broader in scope than paragraph 4 of the DMEO, and reflects the scope of the Commission's information gathering powers set out in paragraph 9.1(1)(o) of the *Broadcasting Act*. Given the more explicit recognition of online undertakings under the amended *Broadcasting Act* and the Commission's mandate to integrate online undertakings into the broadcasting system, it is necessary for the Commission to have the ability to collect this type of information in order to assess the revenues and expenditures of online undertakings, including with respect to Canadian programs, as well as the habits and preferences of online viewers.

69. The Commission considers that concerns relating to the confidentiality of information reflect the possibility that some parties are less familiar with the Commission's processes and how it conducts itself in this regard. Under the Commission's obligations and practices regarding the collection and disclosure of confidential information, undertakings will have the right to designate any information submitted as confidential under subsection 25.3(1) of the *Broadcasting Act*, and include a rationale as to why the disclosure of such information would not be in the public interest. The Commission will only require disclosure after receiving comments from the undertaking if it determines that the public interest in disclosure is not outweighed by any harm likely to be caused by disclosure, or if the information does not fall under one of the categories for confidentiality set out in subsection 25.3(1) of the *Broadcasting Act*, which reads as follows:

> A person who submits any of the following information to the Commission may designate it as confidential
>
> (a) information that is a trade secret;
>
> (b) financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or
>
> (c) information the disclosure of which could reasonably be expected
>
> (i) to result in material financial loss or gain to any person,
>
> (ii) to prejudice the competitive position of any person; or
>
> (iii) to affect contractual or other negotiations of any person.

70. Under the Commission's confidentiality rules, the assessment of confidential information is generally done on a case-by-case basis. However, where it collects information as part of one of its surveys, such as the Digital Media Survey, or as part of the annual returns submitted by traditional services, the information that will be held in confidence is identified in advance. In this regard, the Commission notes that the level of confidentiality granted under the Digital Media Survey, while still applicable to information collected in that survey until or unless Broadcasting Regulatory Policy 2022-47 is amended, will not necessarily be extended to other information that is filed in response to a request from the Commission.

71. The Commission also notes concerns raised by parties that the new information gathering condition of service could touch upon personal information. The Commission also acknowledges the regulatory policy set out in paragraph 5(2)(g.1) of the *Broadcasting Act*, which provides an express requirement that the Canadian broadcasting system should be regulated and supervised in a flexible manner that protects the privacy of individuals who are members of the audience for programs broadcast by broadcasting undertakings. The Commission's general practice is to collect aggregated, anonymized data, and to avoid collecting personal information whenever possible. To the extent that personal information may need to be collected, the Commission's use and disclosure of that information would always be in compliance with its obligations under the *Privacy Act*.

72. In regard to concerns regarding administrative burden, the Commission's intent through imposing the condition of service is to collect only information that is necessary and to impose as limited a burden as possible. Most online undertakings, to further their business operations, already collect the data that the Commission will be requesting. Information such as revenues and subscribership are part of the regular data gathering metrics that businesses normally track, although the periods over which they collect this information may be different than the broadcasting year (i.e., 1 September to 31 August) often used by the Commission.

73. In regard to the wording of the condition of service, the Commission considers that certain of the proposed amendments would keep the scope of the information to be requested narrow and focused on that which is necessary for the Commission to fulfil its mandate. However, the Commission also considers that deleting the phrases "technical operations" and "or financial affairs in Canada" could limit its ability to request information regarding technical operations, information that may be needed in order to investigate a complaint, and information regarding broader financial information, such as audited financial statements, needed in order to validate broadcasting revenues. Further, in regard to Spotify's argument that information requests should have a meaningful nexus to Canada, and should be constrained to undertakings in Canada, which was supported by Rogers, the Commission agrees with these concerns, and considers that they could be addressed through amendments to the proposed condition of service set out below.

74. In light of the above, pursuant to subsection 9.1(1) of the *Broadcasting Act*, the Commission **orders** online undertakings as identified in this regulatory policy, by **condition of service**, to adhere to the following requirements relating to information gathering (changes in bold):

> 1. The online undertaking shall provide, in such form and at such time as requested by the Commission:
>
> (a) information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;
>
> (b) information**, that is in the undertaking's possession, custody or control,** regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations **or** subscribership, or financial **information about broadcasting** in Canada;
>
> (c) information regarding the undertaking's adherence to the conditions of service, the *Broadcasting Act*, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and
>
> (d) a response to a complaint filed **with regard to broadcasting in Canada**.

75. The specifics of this condition of service and its application are set out in Broadcasting Order 2023-332, set out in Appendix 1 to this regulatory policy.

76. As a reminder, the determinations set out in Broadcasting Regulatory Policy 2022-47 remain in effect, and undertakings that meet the thresholds set out in Appendix 1 to that regulatory policy will continue to be required to complete the Digital Media Survey. The Commission notes that, in the future, it may expand or modify the requirement to participate in the Digital Media Survey, or the content of that survey.

77. As discussed below, it is the Commission's view that online undertakings whose single activity and purpose consist either of providing video game services or of providing audiobook services should not be subject to any of the conditions of service, including that relating to information gathering. In regard to other types of online undertakings, the Commission is of the view that the information gathering condition of service should not be limited based on any other criteria, including the monetary threshold as set out below for other conditions of service. This condition of service is an important regulatory tool that should apply to all online undertakings, regardless of size. Its broad application will ensure that the Commission is able to obtain information from all players who operate in the marketplace in order to fulfil its mandate of regulating and supervising the Canadian broadcasting system. In the Commission's view, adherence to the requirement set out in that condition of service is necessary to effectively supervise and regulate the Canadian broadcasting system.

78. As noted above, the Commission has maintained paragraphs 12 through 15 of the VODEO, and has determined that the wording of paragraph 14 of that exemption order should mirror the wording of the condition of service it adopts in regard to information gathering. Accordingly, the Commission replaces paragraph 14 of the VODEO with the following:

> 14. The undertaking of the type described in paragraphs 12 and 13 shall provide, in such form and at such time as requested by the Commission:
>
> (a) information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;
>
> (b) information, that is in the undertaking's possession, custody or control, regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations or subscribership, or financial information about broadcasting in Canada;
>
> (c) information regarding the undertaking's adherence to the conditions of service, the *Broadcasting Act*, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and
>
> (d) a response to a complaint filed with regard to broadcasting in Canada.

79. The amended VODEO is set out in Appendix 2 to this regulatory policy.

Undue preference and undue disadvantage

80. Under paragraph 3 of the DMEO, an exempt undertaking cannot give an undue preference to any person, including themselves, or subject any person to an undue disadvantage. In the Notice, the Commission sought comments on whether the condition of exemption set out in paragraph 3 should be continued as a condition of service for online undertakings.

Positions of parties

81. In regard to online undertakings, various interveners opposed the continuation of undue preference prohibitions that currently apply as part of the DMEO. However, most interveners submitted that some form of undue preference framework should be maintained going forward.

82. According to BCE and the CAB, the central argument in favour of undue preference revolves around equity and equitable regulation in an increasingly competitive market. Quebecor stated that maintaining the prohibition of undue preference or disadvantage is necessary in the context of a broadcasting market that is even riskier today than it was in the past. In its view, maintaining this requirement in the new regulatory framework would make it possible to maintain a

protective shield against the major players in the ecosystem and to act in the event of any inequities that may arise.

83. Other interveners, including Apple, Google, Spotify, the MPAC and AMC, considered the undue preference requirements to be outdated. In their view, the proposed condition of service represents a misguided attempt to apply some version of the undue preference/undue disadvantage concept to online undertakings, but that does not properly reflect the business model of online undertakings. In their view, while such requirements may have made sense for traditional services, the competitive online market is not as vertically integrated. Apple added that the Commission's net neutrality regime, including its rulings respecting Internet traffic management practices and framework for assessing the differential pricing practices of Internet service providers (ISP), addresses any theoretical concern regarding ISPs blocking access to or otherwise unduly preferring or discriminating against particular content.

84. In regard to modifying the undue preference framework, the majority of interveners supported undue preference requirements that apply to all online undertakings but diverged on the specifics of their implementation (i.e., via regulation or via a condition of service). For example, the CAB noted the risk associated with imposing undue preference prohibitions as a condition of service instead of by regulation. It stated that although paragraph 10(1)(h.1) of the *Broadcasting Act* provides that the Commission can make regulations "respecting unjust discrimination by a person carrying on a broadcasting undertaking and undue or reasonable disadvantage imposed, by such a person," it noted that no such authority has been granted related to the issuance of an order, which is how conditions of service are imposed, under section 9.1 of the *Broadcasting Act* or elsewhere in the statute. As a result, the CAB and others proposed that these conditions be imposed by regulation.

Commission's decision

85. Undertakings operating under the DMEO or the VODEO were already subject to a condition of exemption prohibiting them from giving an undue preference to any person, including themselves, or subjecting any person to an undue disadvantage, so maintaining this requirement would not impose any new obligation on them. Historically, the Commission has relied on undue preference/undue disadvantage provisions to address a wide range of anti-competitive behaviour, including undesirable conduct by vertically integrated broadcasting undertakings operating online platforms.[11]

86. With the amendments to the *Broadcasting Act*, the Commission is now expressly authorized, pursuant to paragraph 10(1)(h.1),[12] to make regulations relating to undue preference and undue disadvantage, and considers that a comprehensive

[11] In this regard, see Broadcasting Regulatory Policy 2011-601.

[12] The amended *Broadcasting Act* specifically gives the Commission power "respecting unjust discrimination by a person carrying on a broadcasting undertaking and undue or unreasonable preference given, or undue or unreasonable disadvantage imposed, by such a person".

framework in this respect would be beneficial. Unfortunately, developing such a framework and making the regulations will take some time. In the meantime, given the rapidly changing competitive market environment and the very high stakes in this market, particularly for smaller players with less market power, the Commission considers that it would be appropriate to impose a condition of service relating to undue preference on registered[13] online undertakings, which would apply until such time as the regulations are made. The Commission notes that the list of conditions of service set out in subsection 9.1(1) of the *Broadcasting Act* is not exhaustive. The Commission considers that the scope of its discretion under subsection 9.1(1) is sufficiently broad to empower it to impose the temporary condition of service respecting undue preference and disadvantage set out below. Given the importance of this protection, particularly to smaller broadcasters, the Commission finds that, as a temporary measure, an undue preference condition of service has considerable merit. Further, the imposition of such a condition of service would contribute to achieving a number of policy objectives set out in the *Broadcasting Act*, in particular subparagraphs 3(1)(d)(ii)[14], 3(1)(d)(iii), 3(1)(d)(iii.5), 3(1)(d)(v), 3(1)(t)(ii)[15] and 3(1)(t)(iii).

87. In light of the above, pursuant to subsection 9.1(1) of the *Broadcasting Act*, the Commission **orders** online undertakings as identified in this regulatory policy, by **condition of service**, to adhere to the following requirement relating to undue preference and undue disadvantage, until such time as the regulations are made:

> 2. The online undertaking shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any

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[13] See Broadcasting Regulatory Policy 2023-329.

[14] 3(1)(d): "It is hereby declared as the broadcasting policy for Canada that the Canadian broadcasting system should

(ii): encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, and foster an environment that encourages the development and export of Canadian programs globally,

(iii): through its programming and the employment opportunities arising out of its operations, serve the needs and interests of all Canadians — including Canadians from Black or other racialized communities and Canadians of diverse ethnocultural back- grounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages — and reflect their circumstances and aspirations, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples and languages within that society,

(iii.5): ensure that Canadian independent broadcasting undertakings continue to be able to play a vital role within that system,

(v): reflect and be responsive to the preferences and interests of various audiences,"

[15] 3(1)(t): "It is hereby declared as the broadcasting policy for Canada that distribution undertakings

(ii): should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii): should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services,"

proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

88. The specifics of this condition of service and its application are set out in Broadcasting Order 2023-332, set out in Appendix 1 to this regulatory policy.

89. In the Commission's view, this will ensure a certain degree of continuity and consistency with existing undue preference provisions in the previous DMEO, while ensuring symmetry between online undertakings and licensed broadcasters that are also subject to regulations on undue preference. Further, it will ensure a certain degree of equity in an increasingly competitive market, especially between Canadian players, many of which are already subject to similar requirements, and non-Canadian players.

Making content available over the Internet

90. In the Notice, the Commission proposed a condition of service relating to the availability of content. Specifically, it proposed that all of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific BDU, mobile service, or retail Internet access service.

91. Related – although somewhat different – conditions are already set out in the DMEO and the VODEO to avoid tied-selling (i.e., requiring the acquisition of one service in order to obtain another service). For example, Canadians should not be forced to pay for a separate additional mobile or Internet service in order to receive the programming they want.

Positions of parties

92. Parties who intervened agreed overall that the requirement to offer content over the Internet should be continued as a condition of service, as it would prevent an undertaking from offering programming in a manner that is dependent on a subscription to a specific mobile or Internet service.[16]

93. TELUS was strongly in favour of this proposal, in particular in regard to including language related to BDU services, as a means of protecting customers by ensuring that migrating content from traditional to online platforms is not a viable strategy for vertically integrated companies to secure exclusive or preferential distribution of content on their platforms. TELUS also proposed more robust safeguards to acknowledge that vertically integrated online undertakings may have incentives to deny their competitors access to content. It considered that vertically integrated

[16] Rogers, TELUS, BCE, the DOC, Cogeco, Sirius XM Canada Inc., the Association des réalisateurs et réalisatrices du Québec/the Guilde des musiciennes et musiciens du Québec/the Société des auteurs de radio, télévision et cinéma/the Union des artistes (joint intervention), and the Canadian Broadcasting Corporation.

online undertakings must be required to provide competing distribution platforms with access to the programming they control. Bragg Communications Inc., carrying on business as Eastlink (Eastlink), supported the imposition of this condition of service, and proposed additional conditions to ensure greater safeguards against exclusive distribution.

94. Apple and the MPAC considered the condition of service to be unnecessary given that offering content over the Internet, that is, over open distribution networks to all Canadians, is a defining feature of online broadcasting.

95. Quebecor also considered that such a condition of service should not be imposed on online undertakings. It noted that the exemption set out in the DMEO is narrower, as it only prohibits services from providing exclusive access to programming **designed primarily for television** (emphasis by intervener) in a manner that is dependent on a consumer's subscription to a specific mobile or Internet service provider. Quebecor added that it does not refer to BDU subscriptions. It opposed imposing a condition of service that applies to all programming (not just television programming), as this could impact certain business models, such as those for the Helix TV or Bell Fibe TV application (or apps), which provide access to programming that is reserved exclusively for their cable television subscribers and that is currently compliant with the DMEO.

96. Along the same lines, the CAB submitted that the language in relation to making programming available over the Internet might be overly broad and may have an unintended effect. It acknowledged that the intent is to prohibit an online undertaking from entering into an arrangement with an ISP, mobile provider or BDU such that one would need to be a customer to one of those services to access exclusive content. It noted, however, that most BDUs have apps that can be used with any Internet provider, but generally require a subscription to the BDU that provides the app, as it is connected to the subscription. The CAB added that none of the content on the app is exclusive to the BDU and the content is accessible to all BDUs across Canada, but that with the proposed language, BDUs may have to make these apps available to competing BDUs, which is not the Commission's intention.

97. The CAB proposed the following amendment to the condition of service proposed in the Notice in regard to the availability of content (change in bold):

> All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific broadcasting distribution undertaking, or mobile service, or retail Internet access service, **unless the online undertaking offers a service designed to duplicate what is available through a related broadcasting distribution undertaking**.

98. In line with its submissions on undue preference and undue disadvantage, the CAB also proposed that this requirement be imposed by regulation, rather than by condition of service.

Commission's decision

99. In the Commission's view, this condition of service is intended to be a means to protect against tied-selling. The underlying objective is to protect consumers and ensure that they do not have to subscribe to an additional access service (i.e., mobile or Internet access service) to obtain the programming of their choice.

100. As noted above, there was broad support for some form of condition of service relating to making content available over the Internet without tying it to the purchase of another service. The Commission is mindful, however, of the concerns raised by Quebecor and the CAB that the wording proposed in the Notice might interfere with BDUs that provide access to programming reserved exclusively for their BDU subscribers through an app that requires a subscription to that BDU. Similarly, programming services may offer apps that provide access to their content online, but require the viewer to confirm that they pay for that content through a subscription to a BDU. In the Commission's view, apps of this type simply provide consumers with additional options to view the content they already pay for. Such an activity should not be considered tied-selling or be prohibited by a condition of service.

101. Further, since the Commission has decided to maintain paragraphs 12 through 15 of the VODEO for the time being, the Commission finds that it would be appropriate to amend the language in the proposed condition of service to remove the reference to BDUs, so as not to disrupt their current business models. The Commission notes that it may consider adjusting or expanding this condition of service in the future.

102. The Commission acknowledges concerns raised about the scope of this condition of service as compared to the existing provisions of the DMEO. The Commission notes that the prohibition against tied-selling with a mobile or retail Internet service is being applied to all programming, not just television programming, whether offered on an exclusive basis or not. In the Commission's view, the updated condition of service reflects the applicability of such provisions to foreign streaming services. However, the Commission also considers that the substantive obligations remain the same. Online undertakings to which this condition of service applies must not be prevented from making content available to any subscriber of a mobile or retail ISP.

103. In light of the above, pursuant to subsection 9.1(1) of the *Broadcasting Act*, the Commission **orders** online undertakings as identified in this regulatory policy, by **condition of service**, to adhere to the following requirements relating to making content available online on registered online undertakings:

3. All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific mobile service or retail Internet access service.

104. The specifics of this condition of service and its application are set out in Broadcasting Order 2023-332, set out in Appendix 1 to this regulatory policy.

Filing financial information

105. Pursuant to subsection 11(1) of the *Broadcasting Act*, the Commission may make regulations, with the approval of the Treasury Board, establishing schedules of fees to be paid by persons carrying on broadcasting undertakings of any class. As noted above, the Commission has issued Broadcasting Notice of Consultation 2023-280, in which it called for comments on proposed new *Broadcasting Fees Regulations*.

106. A mechanism that requires online undertakings to file fee returns that can be used in a timely manner to calculate fees is necessary for the Commission to collect the fees that fund its operations. With a 1 April 2024 target date for the coming into force of the final *Broadcasting Fees Regulations*, the Commission noted in Broadcasting Notice of Consultation 2023-280 that a transitional measure is required to ensure that certain online undertakings file fee returns by 30 November 2023, so that their data can be used in the calculation of fee invoices in March 2024 for the upcoming 2024-2025 fiscal year.

107. In regard to that mechanism, in the Notice, the Commission sought comment on its proposal to impose a transitional condition of service (i.e., condition of service 4 set out in the appendix to the Notice) that would require online undertakings to file financial information for fee purposes by the same 30 November filing date that applies to current feepayers. The proposed new *Broadcasting Fees Regulations* refer to the condition of service requiring fee return information proposed via an order to be made under subsection 9.1(1) of the amended *Broadcasting Act*, with a view to incorporating the result of it by reference into the final *Broadcasting Fees Regulations*.

108. The fee return would include information on gross revenues derived during a broadcast year from Canadian broadcasting activities. This includes the gross annual Canadian revenues (after deducting excluded revenues[17]), or, if such information is not available, the gross annual Canadian broadcasting revenues (after deducting excluded revenues) that, based on market trends and on comparable services in the market in which the undertaking operates, its business plan and its previous financial performance, the Commission considers to be related to the undertaking's broadcasting activities in Canada.

[17] In the Notice, the Commission defined "excluded revenue" as "revenue that originates from providing video game services or unique transactions."

Positions of parties

109. Overall, interveners supported the filing of financial information with the Commission, as such information is necessary for the Commission to establish accurate annual fees. While the Fédération culturelle canadienne-française (FCCF) supported the filing of financial information, it noted that the phrase "Canadian broadcasting activity" in the proposed condition of service is undefined, vague, and inconsistent with the wording used in proposed condition of service 4.(b)(i).[18]

110. Certain interveners, however, expressed concerns relating to confidentiality, scope, and administrative burden.

111. Apple stated that only information that is absolutely necessary for the purposes of the regulatory regime as it currently exists should be collected through the proposed requirement. It noted that the collection of such information must be subject to ironclad confidentiality requirements, as reflected in the Digital Media Survey and section 25.3 of the *Broadcasting Act*.

112. Spotify submitted than any information collected should be limited to that which has a meaningful nexus to Canada, that any third-party information to be collected must be protected, and that the confidentiality framework must be updated.

113. Rogers opposed any attempt to integrate affiliated online undertakings into the regulatory fee regime until the fees paid by the broadcasting ownership group have been recalibrated and lightened. It submitted, however, that the annual fee return must contain the minimum information necessary to establish fees in accordance with the requirement in this regard set out in the *Broadcasting Act*, and that any information collected should be subject to rigorous confidentiality requirements.

114. The MPAC, supported by Netflix, proposed that the fee return condition should be calculated only against regulated revenues, not exempt ones. Both Rogers and Google submitted that fee revenue should be defined as annual revenues less excluded revenue. Warner Bros. Discovery supported this approach, and added that Canadian programming expenditures should relate to online undertakings carried on in Canada.

115. Google submitted that the reference to "Canadian broadcasting activity of the online undertaking" in the proposed condition of service 4 is overly expansive and should be amended to clarify that any measured revenues are limited to revenues from the (regulated) online undertaking. Google added an online undertaking's "financial affairs in Canada" is undefined and potentially overly broad in scope,

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[18] Specifically: "For the purposes of paragraph (a), fee revenue, in respect of an online undertaking, means the gross revenue derived during a broadcast year from the Canadian broadcasting activity of the online undertaking, or by an affiliate, and, without limiting the generality of the foregoing, includes the gross annual Canadian broadcasting revenue, as reported by the online undertaking and validated by the Commission, where the undertaking has not filed a fee return covering 12 months of the most recently completed return year".

and should be confined to a given undertaking's actual regulated activities carried on in Canada. Finally, Google noted that while the proposed condition of service 4.(a) refers to "fee return," the term defined in the proposed condition of service 4.(b) is "fee revenue," and that this discrepancy should be clarified.

Commission's decision

116. This proposed condition of service is intended to be transitional, to require registered online undertakings to file financial information for fee purposes by the same 30 November filing date that applies to current feepayers. However, in light of the coming into force of the *Online Undertakings Registration Regulations* by 29 September 2023 (see Broadcasting Regulatory Policy 2023-329), with a 60-day period for registration, it may not be possible for all online undertakings that must register to do so before 30 November. Accordingly, for the first year, the Commission intends to issue fee returns to a smaller set of online undertakings that have previously been identified as participants in the Digital Media Survey. Since the Commission already has information on the revenues of these undertakings through that survey, the Commission will be able to determine which of these undertakings will be required to register based on the threshold for registration set by the Commission in Broadcasting Regulatory Policy 2023-329. This subset of online undertakings, which the Commission anticipates will represent the vast majority of the revenues of all online undertakings in Canada, will therefore be required to submit fee returns by 30 November 2023. Thereafter, fee returns for all online undertakings that form part of a group to which this condition of service applies, including those in the subset described above, would become due on 30 November of each year, until the current *Broadcasting Licence Fee Regulations, 1997* are replaced by new *Broadcasting Fee Regulations* and the condition of service expires.

117. Issuing fee returns in this manner will provide the Commission with access to the same type of necessary financial data about online undertakings that it currently collects from licensed broadcasting undertakings. This financial data would help the Commission to determine the most equitable and appropriate way to integrate online undertakings into a new or restructured broadcasting fee regime, which includes calculating the fees payable in the period in which any new or restructured broadcasting fee regulations may come into force in the future. This would also provide transparency and ensure that there is an enforceable manner to collect financial information from online undertakings.

118. In regard to concerns over the definition of annual revenue used in the proposed condition of service, the Commission notes that certain interveners focused on the definition used to calculate the proposed threshold for exemption from registration requirements (Broadcasting Notice of Consultation 2023-139), while others focused on the information to be included in the fee return (Broadcasting Notice of Consultation 2023-280).

119. The Commission notes that the transitional fee return condition of service will require online undertakings, and not ownership groups, to file a fee return. This reflects the fact that licensed broadcasting undertakings already have an obligation to file a fee return under the current *Broadcasting Licence Fee Regulations, 1997*. During the transition period, the Commission will therefore collect fee information from each online undertaking separately, and the Commission will use this information, along with the fee returns of licensed broadcasters, to file fee invoices.

120. The Commission also notes that a number of interveners submitted that certain revenue should not be included in the definition of fee revenue. In regard to the proposed fee return condition of service, the Commission finds that "fee revenue" should mean "annual revenues" less "excluded revenue," as any fee that online undertakings would be required to pay should only be calculated against revenues from their services that are not exempt.

121. Accordingly, the Commission considers that it would be appropriate to amend the proposed condition of service to specify that excluded revenue is to be deducted from gross revenue. This means that all revenues from undertakings that are explicitly exempt from licensing and registration are to be excluded. Amending this language will align the definition of "fee revenue" with the definition of "fee revenue" found in the proposed new *Broadcasting Fees Regulations*. Given the transitional nature of this provision, the Commission does not consider that it would be necessary to make any additional amendments to the definition of fee revenue at this time. The Commission notes that interested persons had the opportunity to comment on this as part of the proceeding regarding proposed new *Broadcasting Fees Regulations* (Broadcasting Notice of Consultation 2023-280).

122. Requiring certain online undertakings to file financial information as a transitional measure will enable the Commission to determine fee revenues and issue invoices while the proposed new *Broadcasting Fees Regulations* are being implemented. Including certain online undertakings in the fee regime will help ensure equity among feepayers.

123. In light of the above, pursuant to subsection 9.1(1) of the *Broadcasting Act*, the Commission **orders** online undertakings as identified in this regulatory policy, by **condition of service**, to adhere to the following requirements relating to fee returns:

> 4. (a) If requested by the Commission, the online undertaking shall, on or before 30 November each year, file a fee return, on the form provided by the Commission and containing the information required in the form for the broadcast year, for the one-year period beginning 1 September of the year preceding the calendar year in which the return is required to be filed.
>
> (b) For the purposes of paragraph (a), fee revenue, in respect of an online undertaking, means the gross revenue minus excluded revenue derived during a broadcast year from the Canadian broadcasting activity of the online undertaking,

or by an affiliate to the operator of that online undertaking, and, without limiting the generality of the foregoing, includes

> (i) the annual Canadian gross revenues, as reported by the online undertaking and validated by the Commission, where the undertaking has not filed a fee return covering 12 months of the most recently completed return year; or,
>
> (ii) if such information is not available, the annual Canadian gross revenues that, based on market trends and on comparable services in the market in which the undertaking operates, its business plan and its previous financial performance, the Commission considers to be related to its broadcasting activity.

This definition does not include any amount received by an online undertaking from another broadcasting undertaking to which the *Broadcasting Licence Fee Regulations, 1997* or this condition of service order apply, other than the amounts received from the Canadian Broadcasting Corporation for the sale of airtime.

(c) This condition will be of no force or effect 30 days after any amendments to the *Broadcasting Licence Fee Regulations, 1997*, or new broadcasting fee regulations, come into effect.

124. The specifics of this condition of service and its application are set out in Broadcasting Order 2023-332, set out in Appendix 1 to this regulatory policy.

125. In addition, the Commission may accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years. This would ensure that providing the transitional fee information is not overly burdensome for undertakings that are not accustomed to the broadcast year, and gives them enough time to adjust and prepare for filing fee returns in the future.

126. Consistent with the Commission's previous dealings with fee returns, the fee return will be treated as a confidential filing and the Commission will continue to treat such information as confidential going forward.

Anti-competitive head start rule

127. In regard to the Commission's anti-competitive head start rule, the term "head start" refers to situations where a programming service is launched on a BDU's distribution platform prior to the service having been made available for distribution to other BDUs on commercially reasonable terms. In Broadcasting Regulatory Policy 2011-601, the Commission determined that once a programming undertaking is ready to launch a new pay or specialty service (now known as discretionary services), it must make that service available to all BDUs that wish to distribute the service. The Commission further determined that this "no head start"

rule would also be made to apply to television programming distributed on mobile and retail Internet platforms. This rule is set out in provision 7 of the DMEO.

128. In the Notice, the Commission noted that this rule applied only to online undertakings (previously known as DMBUs) and considered that provision 7 of the DMEO appears to be inappropriate as a condition of service for online undertakings, as it seems to be incompatible with the way many online undertakings operate. The Commission added that undertakings that rely on the Internet generally strive to seek the widest distribution possible, and that since many of those undertakings offer their services directly to consumers, they are likely not to restrict access. Accordingly, the Commission sought comments on whether the condition of exemption related to the anti-competitive head start rule should be continued as a condition of service for online undertakings.

Positions of parties

129. Most interveners who commented on this issue opposed maintaining the anti-competitive head start rule as a condition of service for online undertakings. The MPAC, which represents a number of large players such as Netflix and Paramount Studios and funds numerous production projects across Canada, considered that this rule is no longer applicable to an online context. Spotify elaborated on the MPAC's position by noting that it is the goal of online undertakings to spread their products widely over the Internet without restricting access. In Spotify's view, this means that the rule is simply not relevant to a modern issue.

130. Other interveners disagreed with this rationale. TELUS, Cogeco, and the Independent Broadcast Group (IBG) submitted that vertically integrated undertakings need to be subject to the no head-start rule in order to effectively prevent conflicts of exclusivity. The FCCF emphasized the role that this rule plays in preventing inequity due to its ability to take into account differences between undertakings.

131. Cogeco proposed that the head start rule be strengthened, and argued that it is central to the maintenance of undue preference/disadvantage regulation. It acknowledged that there are situations where undertakings, particularly those belonging to Canadian vertically integrated entities, could have an interest in launching certain content first and restricting access to that content. It submitted, however, that such access could be limited not only based on a customer's subscription to a particular mobile or retail Internet service (as set out in the DMEO), but also on a customer's subscription to a BDU. In Cogeco's view, rather than eliminating this exemption provision, it should be strengthened to prohibit any limited access based on a customer's subscription to a BDU. In regard to Cogeco's proposal, the IBG pointed to the possibility of undue preference rules being able to accomplish this goal without the anti-competitive head-start rule.

Commission's decision

132. The Commission notes that the purpose of the anti-competitive head start rule, as initially envisioned, was to prevent broadcasting undertakings from acquiring exclusive programming rights and then exploiting those rights on specific – often their own – Internet or mobile platforms.

133. In the Commission's view, the business model for online services requires the broadest distribution possible over the Internet in order to achieve those services' business objectives. Any concerns that might arise regarding anti-competitive head starts will be addressed through the undue preference/disadvantage provision as discussed above. Accordingly, the Commission finds that it is not necessary or appropriate to maintain provision 7 of the DMEO as a condition of service for online undertakings. The Commission will monitor the impact of removing the anti-competitive head start rule and intends to consider various types of anti-competitive behaviours, including the head-start rule, in a future proceeding.

Dispute resolution

134. Historically, online undertakings were treated as subsets of either programming or distribution undertakings, or some combination thereof, and, therefore, were considered to be captured by the Commission's dispute resolution authority, which allowed it to create regulations to resolve disputes between linear programming undertakings and distribution undertakings. However, the current *Broadcasting Act* redefines programming undertakings and distribution undertakings to expressly exclude online undertakings. Given this new limitation, in the Notice, the Commission noted that the continued application of dispute resolution provisions found in the DMEO on online undertakings would be inappropriate. In light of this, the Commission sought comments on whether the condition of exemption set out in the DMEO regarding dispute resolution mechanisms should be discontinued.

Positions of parties

135. Certain interveners were in favour of the Commission retaining some form of its dispute resolution framework. The FCCF stated that dispute resolution powers are a strong mechanism for ensuring compliance with the Commission's regulations. The Canadian Independent Screen Fund for BPOC Creators emphasized this point through a lens of racial equity, arguing that alternative dispute resolution is particularly important for allowing marginalized groups to defend themselves on a fair playing field.

136. Other interveners favoured the discontinuation of the dispute resolution condition of exemption for online undertakings. In their view, the framework is outdated, and its continued use would be unduly restrictive for such undertakings. Apple, BCE and Spotify argued that it would be consistent with the recent amendments to the *Broadcasting Act* to restrict the Commission's dispute resolution role to conflicts between programming undertakings and distribution undertakings. Rogers considered the Commission's dispute resolution powers to be limited in the first place.

137. Although the majority of interveners were in favour of maintaining the Commission's dispute resolution powers, they were divided as to how this framework should carry on, each providing their own suggestions for modifications to the current framework.

138. The IBG considered that it would be problematic to carry the existing dispute resolution provisions forward as they are, yet stated that the Commission should still find ways to retain this power in an adapted form. The Laboratoire de recherche sur la découvrabilité et les transformations des industries culturelles à l'ère du commerce électronique submitted that the current alternative dispute resolution framework needs to be updated through public consultation, particularly when it comes to matters of competition and "internal lobbying" by dominant actors. TELUS added that the standstill rule should be preserved going forward, so as to ensure that Canadians do not lose access to programming while there is a dispute among BDUs. Racial Equity Media Collective and the FCCF supported the current dispute resolution provisions.

139. In support of increasing the scope of the current dispute resolution framework, the CAB considered that a requirement to engage in good faith negotiations facilitated by the Commission should be added to any conditions of service or exemption order for online undertakings. It stated that this would apply where the Commission has issued an order requiring the online undertaking to carry a particular service. The Canadian Independent Screen Fund for BPOC Creators argued that dispute resolution in its current form risks leaving Black and racialized individuals, as well as other marginalized groups, in a vulnerable position. It argued that new alternative dispute resolution mechanisms should be explored in a culturally competent and inclusive manner.

Commission's decision

140. As set out in the Notice, the *Broadcasting Act* limits the Commission's dispute resolution authority to resolving disputes between programming undertakings and distribution undertakings. Given that online undertakings have now expressly been carved out of the definitions of programming undertaking and distribution undertaking, there is some question as to the Commission's ability to continue to regulate the resolution of disputes involving online undertakings pursuant to paragraph 10(1)(h) of the *Broadcasting Act*. While the Commission has the authority to make regulations for resolving disputes, it is unclear whether the Commission can similarly engage in dispute resolution through the imposition of conditions of service regarding those same matters. Although several interveners made proposals regarding dispute resolution between online and other undertakings, in light of the above, the Commission considers that it would not be appropriate to impose a condition of service relating to such disputes under the current *Broadcasting Act* at this time.

141. In the sections below, the Commission examines various aspects of its current dispute resolution processes and considers whether conclusions can be drawn at this time in regard to these processes and their application to online undertakings. Although the Notice did not set out specific questions for comment in regard to the issues addressed below, these issues were raised by certain interveners in their submissions, and the Commission considers it appropriate to address them as part of the present proceeding.

Extending the Wholesale Code to online undertakings

142. The Commission's alternative dispute resolution team uses the Wholesale Code[19] as a guide in performing its functions.[20] Without the Wholesale Code or a similar framework, Commission-sanctioned dispute resolution as administered by the designated Commission staff would only apply to the distribution of linear programming services by BDUs, possibly providing a competitive advantage to online undertakings.

143. The Wholesale Code currently applies to most licensed undertakings by means of conditions of service. Although exempt DMBUs were not expressly subject to the Wholesale Code, the Commission has used that code as a guide in making decisions regarding such services.

144. The Wholesale Code governs aspects related to commercial arrangements between distribution and programming undertakings and provides the Commission with the necessary regulatory tools to resolve disputes between industry players who have competitive disagreements.

145. In the Commission's view, given the lack of certainty in regard to whether or how the Wholesale Code might apply under the current *Broadcasting Act*, it would not be appropriate for the Commission to make any statements about it at this time. Rather, the Commission finds that issues relating to the application of the Wholesale Code to online undertakings would be more appropriately explored through a future public proceeding.

The standstill rule

146. In Broadcasting Regulatory Policy 2015-96, the Commission implemented a new regulatory framework to ensure that Canadians have access to a diverse range of content through a healthy, dynamic television market. In that regulatory policy, the Commission stated that it was prepared to intervene where it finds that parties are acting in an anti-competitive manner.

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[19] The Wholesale Code is set out in the appendix to Broadcasting Regulatory Policy 2015-438.

[20] The Commission's alternative dispute resolution team 1) interprets the Wholesale Code, 2) handles undue preference and competitive complaints, 3) analyzes affiliation agreements, 4) monitors negotiations and 5) facilitates mediation.

147. The standstill rule is one such measure. As set out in Broadcasting Regulatory Policy 2012-407, and as captured in the various regulations, during an ongoing dispute between programming undertakings and distribution undertakings, the parties are to provide continued access to programming services and distribution of such services on the same terms and conditions as they did before the dispute. The standstill rule was put in place to level the field during negotiations between programmers and distributors, and to ensure that Canadians do not lose access to programming services they pay for while BDUs and programmers negotiate the terms and conditions of distribution.

148. In light of the concerns raised in regard to dispute resolution generally, the Commission considers it inappropriate to impose the standstill rule on online undertakings in the case of a dispute. Rather, the Commission intends to explore alternative options in a future proceeding.

"Good faith negotiation"

149. Should there be an issue in contract negotiations between online undertakings and BDUs or programmers, the *Broadcasting Act* provides that the Commission may take a more hands-on role in negotiations, incentivizing the online undertaking to act in "good faith."

150. In regard to the comments made by the CAB relating to "good faith negotiations," the Commission notes that, pursuant to paragraph 9.1(1)(i) of the *Broadcasting Act*, the Commission may make orders imposing conditions respecting a requirement, without terms or conditions, for a person carrying on an online undertaking that provides the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking to carry programming services, specified by the Commission, that are provided by a broadcasting undertaking. Pursuant to subsection 9.1(9), the "person carrying on an online undertaking to whom an order made under paragraph (1)(i) applies and the person carrying on the broadcasting undertaking whose programming services are specified in the order shall negotiate the terms for the carriage of the programming services in good faith." Pursuant to subsection 9.1(10), the Commission may facilitate those negotiations on request of either contracting party. As such, the Commission could be called upon to determine whether a party or parties have complied with these obligations.

151. As the current *Broadcasting Act* does not provide any guidance on what is meant by the expression "good faith negotiations," there is a need to define, at least in some manner, what that expression means. In the present proceeding, the Commission does not consider that it would be appropriate to set out any decisions or make any statements in regard to the possible future role or definition of "good faith negotiations." Instead, the Commission considers that it would be more appropriate to address the issue of "good faith negotiations" as part of Step 2 of the proceeding launched by Broadcasting Notice of Consultation 2023-138 and, potentially, in parallel with similar concepts that will need to be developed in respect of the *Online News Act*.

Conclusion

152. In light of all of the above, the Commission finds that it would not be appropriate to impose a condition of service relating to dispute resolution. In its view, issues relating to dispute resolution processes should be addressed at a future public proceeding.

Application of conditions of service

153. As set out in the Notice, the Commission proposed to exclude four classes of undertakings from the application of the conditions of service:

    (i) online undertakings whose single activity and purpose consists of providing video game services;

    (ii) online undertakings whose single activity and purpose consists of providing unique transactions;

    (iii) online undertakings affiliated with a broadcasting ownership group that has, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than $10 million; or

    (iv) online undertakings that have no affiliation whatsoever with a broadcasting ownership group, if they have, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than $10 million.

154. While the Commission framed the questions in the Notice in terms of exemption from the conditions of service, the Commission will not be issuing an exemption order as it has done in Broadcasting Regulatory Policy 2023-329 in regard to the requirement for online undertakings to be registered with the Commission. Rather the order imposing the conditions of service set out in Appendix 1 to this regulatory policy will clearly identify the undertakings that are and are not subject to those conditions of service.

155. Nevertheless, the Commission considers that, in determining who should be subject to the conditions of service, it is appropriate to apply a lens similar to that used in determining whether to exempt an undertaking from the requirement to be registered. That is, it would be appropriate to take a *de minimis* approach and exclude them from the application of the conditions of service only where compliance with the requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*. Although the consideration of and the decisions taken in regard to the issues set out in Broadcasting Regulatory Policy 2023-329 and the present regulatory policy were separate, the Commission is mindful that setting different thresholds for registration and conditions of service could lead to confusion, and that in many cases the arguments presented by parties were similar. For this reason, the Commission has strived to ensure that the decisions taken in each regulatory policy are, to the greatest extent possible, harmonized. In the Commission’s view,

having a harmonized approach to registration and to conditions of service will provide additional clarity to both traditional stakeholders and online undertakings.

156. In the sections that follow, the Commission addresses issues relating to a threshold for exclusion from the conditions of service, as well as various classes of online undertakings proposed for exclusion by the Commission in the Notice and by interveners in their submissions to this proceeding. While there were comments on both sides of most of the issues, in general, only comments that were opposed to or proposed changes to the Commission's proposals in the Notice are referred to below. The Commission also notes that many of the submissions filed in the context of the Notice in regard to the issues addressed in this section are the same as or similar to those filed in the context of Broadcasting Notice of Consultation 2023-139.

Monetary threshold for the application of the conditions of service

157. Based on its review of the record for this proceeding, the Commission has identified the following issues to be examined in regard to the threshold for exclusion from the application of the conditions of service:

- whether a threshold should be applied in regard to the application of the conditions of service;
- if so, whether a monetary threshold is the appropriate criterion to determine whether an undertaking would be subject to the conditions of service;
- whether it would be appropriate to apply the threshold level on broadcasting ownership groups as a whole, or on individual online undertakings, and to include revenues of traditional broadcasting undertakings; and
- whether the threshold of $10 million in annual Canadian gross revenues from broadcasting activities, as proposed in the Notice, is appropriate.

Application of a threshold in regard to the conditions of service

Positions of parties

158. As noted above, several interveners proposed that the conditions of service apply to all undertakings, regardless of their registration or ownership status.[21] The CAB and Cogeco submitted that conditions of service relating to undue preference and making content available over the Internet should apply to all online undertakings. In this regard, it noted that there is currently no threshold applied under the DMEO and that these basic conditions of service offer important competitive protections.

[21] Including Corus, IBG, TELUS and the Association des réalisateurs et réalisatrices du Québec.

159. The Director's Guild of Canada (DGC) and the DOC considered that it would be premature to exclude online undertakings from the application of three critical conditions of service. They argued that more information about these classes of undertakings is required in order to make informed recommendations for an appropriate evidence-based exemption decision. Such information could include an estimate on the volume of services, their approximate revenue levels (or at least the estimated aggregate revenues of the classes), the types of services and the audiences served. The FCCF noted that the conditions that other, exempt undertakings must follow do not have a threshold.

160. The Canada Media Fund (CMF) and Google supported the Commission's objective of harmonizing the threshold for registration and imposing conditions of service.

Commission's decision

161. The DMEO applies to all digital media undertakings, which includes all online undertakings, and does not exclude anyone from its application by way of a threshold or otherwise. The conditions of service to be imposed on online undertakings in large part replicate obligations that are currently found in the DMEO and represent a baseline level of requirements that are important for maintaining healthy competition in the Canadian broadcasting sector.

162. Nevertheless, the Commission considers that, with the exception of the condition of service relating to information gathering, it is not necessary to apply these conditions of service to all online undertakings at this time given that, on balance, their imposition on smaller undertakings would not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.

163. In regard to the fee returns, online services that do not meet the thresholds established in Broadcasting Regulatory Policy 2023-329, which relates to the requirement to register with the Commission and exemptions from that requirement, are unlikely to be required to pay fees, subject to the outcome of the proceeding initiated by Broadcasting Notice of Consultation 2023-280, and, if that is the case, will also not likely need to file a fee return.

164. In regard to undue preference and making content available on the Internet, small undertakings generally do not have sufficient market power to create a competitive imbalance that would warrant the imposition of such conditions of service. In fact, they are more likely to find themselves on the opposite end of the scale. For clarity, their exclusion from the application of these conditions of service does not prevent them from being able to avail themselves of the undue preference condition of service that will be applied to the larger online undertakings and those online undertakings that form part of a broadcasting ownership group.

165. Interveners provided many reasons for harmonizing the thresholds and exclusions between registration and basic conditions of service, including a consistent regulatory approach, the concern about administrative burden on small

undertakings, consideration of the size of undertakings, the contribution of very small undertakings to the objectives of the *Broadcasting Act*, facilitating innovation among small undertakings, and avoiding imposing obligations that would not aid in the material achievement of the objectives. In the Commission's view, harmonization would ensure that there is consistency among the services in regard to this initial regulation as the broader regulatory framework is developed.

166. Further, the Commission recognizes the administrative burden on small undertakings that may result from the imposition of certain conditions of service, and notes that its goal should be to minimize this burden, consistent with paragraphs 5(2)(g) and 5(2)(h) of the *Broadcasting Act*.

167. Accordingly, the Commission confirms its view that it would be appropriate to use a threshold to determine which online undertakings are subject to the conditions of service relating to undue preference and undue disadvantage, making content available over the Internet, and filing financial information. The Commission also finds it appropriate to harmonize the thresholds with those established in Broadcasting Regulatory Policy 2023-329. The condition of service relating to information gathering, on the other hand, will be applied to all online undertakings, regardless of their size, with the exception of online undertakings whose single activity and purpose consists either of providing video game services or of providing audiobook services.

The use of a monetary threshold

168. The Commission often relies in part on thresholds to trigger requirements or exemptions. For example, it uses revenue levels to determine whether a radio station must make Canadian content development (CCD) contributions and subscriber numbers as the basis for exempting certain discretionary programming services and BDUs. In the Notice, the Commission proposed a monetary threshold based on revenues as one of the bases to exclude online undertakings from the application of the conditions of service.

Positions of parties

169. Several interveners[22] considered a revenue threshold to be appropriate.

170. However, TELUS proposed using a subscriber-based threshold rather than a revenue-based threshold. TELUS considered that such an approach would be administratively simpler, and that a threshold based on the number of subscribers would be "a better indicator of relative size than annual revenues, which can be impacted by factors such as different profit margins." TELUS also considered that the threshold criteria for the conditions of service and for registration should remain separate and distinct.

[22] Including the CMF, the CMPA and one individual.

171. Corus opposed using only a subscriber-based threshold given that the online broadcasting ecosystem includes platforms with different service delivery and monetization models, such as advertising supported platforms with no subscription component. It argued that using a subscriber-based threshold alone would effectively exempt advertising-driven platforms from the scope of the proposed conditions of service.

172. The AQPM, the IBG, ACCORD,[23] ADISQ and Wildbrain Ltd., among others, submitted that potential indicators could be used, such as the proposed revenue model, degree of influence, how content is funded and made available, market share, number of users, number of clicks and/or views, and number of monthly users or listening hours.

Commission's decision

173. The Commission considers that a revenue-based threshold is a relatively simple and objective criterion that can be applied by all online undertakings, regardless of their business models.[24]

174. While some interveners preferred a subscriber-based threshold, the Commission finds that it would not be appropriate to adopt a subscriber-based indicator alone given that doing so would not provide an accurate understanding of the online broadcasting system. As noted by other interveners, it would not capture those online undertakings that have no subscribers, such as advertising-based online undertakings.

175. In regard to using multiple criteria, the Commission notes that there is generally a strong relationship between the number of subscribers and the level of revenues of an undertaking. Adding a subscriber threshold would therefore be largely redundant and burdensome.

176. In light of the above, the Commission finds that a monetary threshold based on annual Canadian gross revenues would be the clearest and most comprehensive way to determine which online undertakings are to be excluded from the conditions of service.

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[23] As set out in the intervention, ACCORD groups together ADVANCE Music Canada, the Association des professionnels de l'édition musicale, the Canadian Council of Music Industry Associations (including Alberta Music, Industries culturelles de l'Ontario Nord, Manitoba Music, Music BC, Music Nova Scotia, Music PEI, Music Yukon, Music/Musique NB, Music NL, MusicOntario and SaskMusic), Agence canadienne des droits de reproduction musicaux, Music Publishers Canada, the Association des auteurs-compositeurs canadiens, the Guilde des compositeurs canadiens de musique à l'image, the Société canadienne des auteurs, compositeurs et éditeurs de musique, and the Société professionnelle des auteurs et des compositeurs du Québec.

[24] Bundled services such as Amazon Prime have methods of allocating revenues for their subscription-based broadcasting undertakings.

Monetary threshold based on the revenues of broadcasting ownership groups versus revenues of individual online undertakings, and inclusion of revenues of traditional broadcasting undertakings

177. For those online undertakings whose operator forms part of a broadcasting ownership group, the Commission proposed a monetary threshold based on the revenues of broadcasting ownership groups, rather than on the revenues of each individual undertaking operating within that group. Such revenues would be included irrespective of whether they are generated by traditional broadcasting undertakings or by online undertakings operating within that group.

Positions of parties

Parties that supported the proposal

178. Several public interest groups and associations representing a variety of members of the broadcasting industry[25] agreed with the proposal set out in the Notice.

179. The Writers Guild of Canada (WGC) raised the issue of fairness. Specifically, it noted that unlike non-affiliated undertakings, online undertakings affiliated with a broadcasting ownership group can benefit from synergies within the group, as those undertakings can cross-promote services and content and consolidate resources that can be made available to multiple undertakings within that group. For the WGC, using a group-based approach would make it more likely that "smaller players" that are exempt are truly smaller, as they lack such synergies and access to resources. The CMPA added that online undertakings affiliated with Canadian broadcasting ownership groups are rarely standalone services but instead the extension of an existing regulated service within the broadcasting group.

180. The CMPA noted that the group-based approach used by Canadian broadcasters provides those broadcasters with greater flexibility in the allocation of programming resources. By being prepared to examine the group, the Commission would recognize the impact of the affiliation of an online undertaking within a broadcasting ownership group (i.e., operational and programming synergies).

181. Certain interveners also considered that a group-based approach would limit the impact of creative accounting. The AQPM considered that an individual undertaking approach could provide an incentive to broadcasters to separate their group into numerous services to avoid registering and, eventually, being subject to conditions of service. CACTUS noted that broadcasters could also divide their networks into imaginary geographic divisions to operate as exempt undertakings.

[25] Including ADISQ, the AQPM, CACTUS, the CMPA, the National Campus and Community Radio Association (NCCRA) and the WGC.

Parties that opposed the proposal

182. Traditional Canadian broadcasters,[26] broadcasters associations[27,] the DiMA, the ITIC, the global streaming services AMC, Apple, Google and Tubi, Inc. (Tubi), and an individual intervener opposed the group-based approach for calculating the revenues on which the exemption threshold is based. In their view, using a group-based approach would require compliance with the conditions of service by very small or nascent online undertakings owned by broadcasters that do not make meaningful contributions to the Canadian broadcasting system.

183. Sirius XM Canada Inc. (SiriusXM), as well as Corus and Cogeco, noted that the Commission has, in the past, regularly exempted BDUs and discretionary services from licensing requirements, notwithstanding that they might operate as part of a larger broadcasting ownership group.

184. According to the CAB, adopting such an approach would do little to provide useful information to the Commission or advance the policy objectives of the *Broadcasting Act*.

185. The Canadian Communications Systems Alliance proposed that the Commission use an undertaking-based threshold given that otherwise, "current exempt undertakings could lose that status which would run directly counter to the Commission's reasons for exempting smaller undertakings."

186. The CAB, the Ontario Association of Broadcasters (OAB) and certain Canadian broadcasters[28] submitted that the group-based approach would be unfair. In their view, under such an approach, the vast majority of online undertakings operated by Canadian broadcasters would be required to comply with the conditions of service, even those that earn very little revenue. The OAB further noted that the approach would impact small radio stations, while AMI added that it would impact licensees of services that benefit from mandatory distribution pursuant to paragraph 9.1(1)(h) of the *Broadcasting Act*. AMI submitted that, under this proposal, it could be more challenging for the Commission and stakeholders to monitor developments in the digital media sector in the months and years ahead.

187. Quebecor noted that using an undertaking-based approach would be in line with section 4 of the *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*[29] (the proposed Direction), which specifies that requirements on broadcasting undertakings must be equitable, given the size

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[26] Including AMI, BCE, Blue Ant Media Inc, Cogeco, Corus, Quebecor, Rogers, SiriusXM, TLN Media Group Inc. and TELUS.

[27] Including the CAB and the Ontario Association of Broadcasters.

[28] Including Corus, Pelmorex Weather Networks (Television) Inc. (Pelmorex), Quebecor and SiriusXM.

[29] On 10 June 2023, the Government of Canada published for comment in the Canada Gazette *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework),* a proposed policy direction that, once finalized, would guide the Commission in its implementation of the amended *Broadcasting Act*. The Commission notes that the proposed Direction has not yet been finalized.

and nature of the undertaking and equitable between foreign online undertakings and Canadian broadcasting undertakings.

188. Corus considered that using a group-based approach would risk entrenching regulatory inequities between foreign and domestic players. It argued that although the definition of "broadcasting ownership group" is not restricted to Canadian media groups, those Canadian groups would be disproportionately impacted by the adoption of a group-based approach. Corus added that whereas established Canadian media groups owning some combination of licensed broadcasting assets would almost certainly come within the scope of the definition, new or recent foreign digital entrants to the Canadian market likely would not.

189. Rogers submitted that requiring an individual online undertaking with annual revenues of less than $10 million, regardless of whether it is operating independently or as part of a larger ownership group, to comply with the conditions of service would not contribute in a material manner to the implementation of Canada's broadcasting policy. SiriusXM, as well as Corus and Cogeco, noted that the Commission has, in the past, regularly exempted BDUs and discretionary services from licensing requirements, notwithstanding that they might operate as part of a larger broadcasting ownership group.

190. Interveners also considered that such an approach would be unfair for Canadian broadcasting ownership groups given that they would be required to include revenues from their traditional services, while foreign ownership groups would only be required to include revenues from online broadcasting. Interveners including BCE, the CAB and Rogers submitted that the proposed approach would include a broadcaster with $15 million in annual revenues from traditional services even if it earns almost no online revenues, while allowing an independent foreign player not to comply with the conditions of service even if it earns annual revenues of $9.9 million.

191. According to Corus, this would provide a head start to foreign online platforms and risk discouraging Canadian-owned media groups from launching new digital products, contrary to Parliament's objective of a level playing field. It submitted that placing more onerous conditions on Canadian broadcasters would run counter to the intended purpose of establishing a modernized regulatory framework that creates equity between broadcasters and foreign streamers.

192. Cogeco noted that the *Broadcasting Act* imposes requirements on undertakings individually, not on ownership groups. It added that the *Broadcasting Act* makes no mention of broadcasting ownership groups.

193. Finally, within the context of the definition of broadcasting ownership group, Tubi stated that it was not familiar with the Commission's concept of control and how that concept is defined.

Commission's decision

194. Paragraphs 5(2)(g) and (h) of the *Broadcasting Act* state that the Canadian broadcasting system should be regulated and supervised in a flexible manner that is sensitive to the administrative burden that may be imposed on undertakings, and that takes into account the variety of undertakings to which that Act applies and avoids imposing obligations on undertakings if it will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

195. In Broadcasting Regulatory Policy 2023-329, the Commission established a monetary threshold for exemption from the new Registration Regulations. Further, in Broadcasting Notice of Consultation 2023-280, it proposed a monetary threshold for the payment of fees under proposed new *Broadcasting Fees Regulations*. In the Commission's view, in regard to the application of the conditions of service, having an approach that is consistent with that for registering with the Commission would help smaller online undertakings to understand and keep track of the regulatory obligations that apply to them. It would also recognize that online undertakings within a broadcasting ownership group may have a material impact on the Canadian broadcasting system by virtue of their affiliation with that group, whereas a similarly sized independent undertaking may have less influence. The group-based approach would allow the Commission to better understand the full ecosystem of broadcasting services provided by large broadcasting groups that play a significant role in the Canadian broadcasting system, both national and international.

196. On the matter of the Commission's proposal to include the revenues of traditional broadcasting undertakings in the calculation of the threshold, it notes that calculating the revenues of broadcasting ownership groups by including revenues from traditional and online services would ensure that the Canadian online undertakings that are part of Canadian broadcasting ownership groups earning revenues above the proposed threshold would be required to comply with conditions of service, regardless of those online undertakings' level of revenue.

197. In light of the above, the Commission finds that for the conditions of service, it would be appropriate to use a threshold based on the revenues of the broadcasting ownership group and to include the revenues of traditional services, as proposed in the Notice. Specifically, including revenues from both traditional and online services would allow the Commission to gain a better understanding of the Canadian online broadcasting environment and how ownership groups are adapting their activities in that increasingly digital environment.

198. In regard to Tubi's comment on the concept of control, the Commission finds that the current definition of broadcasting ownership group can be improved. Accordingly, in the order appended to this regulatory policy, the Commission has amended the definition of broadcasting ownership group so that it reads as follows (change in bold): "**a group of all operators that are affiliates of one another**", and has added the following definition of "operator": "a person that carries on a broadcasting undertaking to which the *Broadcasting Act* applies."

199. Given that the *Broadcasting Act* defines "affiliate",[30] "control"[31] (which is used in the definition of "affiliate") and "broadcasting undertaking,"[32] the Commission finds that these amendments will provide more clarity to both Canadian and foreign operators.

The appropriate amount for the threshold

200. In the Notice, the Commission proposed to exempt from the conditions of service those broadcasting ownership groups, either Canadian or foreign, that have, after deducting any excluded revenue, annual Canadian gross broadcasting revenues from broadcasting activities of less than $10 million.

Positions of parties

201. Rogers, Unifor, PIAC and the CMF considered the threshold to be appropriate.

202. Certain interveners, including Canadian broadcasters,[33] global corporations[34] and industry associations,[35] submitted that the threshold should be set at a level higher than $10 million in annual Canadian gross broadcasting revenues, as the proposed threshold would include online undertakings that do not contribute in a material manner to the objectives of the *Broadcasting Act*. They noted that this could deter new players from entering the market and disadvantage smaller Canadian broadcasters. However, the specific threshold proposed by each intervener often varied.[36]

203. Apple proposed that the Commission adopt the higher thresholds set out in the Digital Media Survey (specifically, $50 million for audio-visual DMBUs and $25 million for audio DMBUs). OpenMedia Engagement Network (OpenMedia) supported a $50 million threshold on the grounds that anything lower could inadvertently place a burden on smaller startups and niche foreign services. It noted that many diasporic Canadians rely on niche foreign services to maintain essential cultural connections with the wider world. According to Roku, a threshold of less than $50 million would impose burdens on still-nascent services that are not yet in a position to have a material effect on the Canadian broadcasting ecosystem and the policy objectives of the *Broadcasting Act*.

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[30] "Affiliate": "in relation to any person, means any other person who controls that first person, or who is controlled by that first person or by a third person who also controls the first person."

[31] "Control": "in the definition of "affiliate," in paragraph 9.1(1)(m) and in subparagraph 9.1(1)(n)(i), includes control in fact, whether or not through one or more persons."

[32] "Broadcasting undertaking": "includes a distribution undertaking, an online undertaking, a programming undertaking and a network."

[33] Such as Cogeco, Corus, Quebecor and SiriusXM.

[34] Such as AMC, Apple, PBS, Tubi, Google and TikTok.

[35] Such as the MPAC and the CAB.

[36] Given that several interveners favoured a threshold level imposed on individual undertaking level rather than on the broadcasting ownership group level, the amounts they proposed refer sometimes to a threshold determined for each undertaking, rather than for a group as a whole.

204. Tubi also proposed a $100 million threshold given that before online services reach this threshold, they might be unable to compete against the larger, dominant streaming services, thereby reducing the ability for Canadian viewers to select lower-cost alternatives.

205. The MPAC proposed that the Commission apply a lower threshold to determine which online undertakings would have to register basic information with the Commission[37] and a higher threshold to determine which online undertakings would be subject to conditions of service and contribution obligations.[38]

206. Several interveners,[39] primarily members of the industry associations and public interest organisations, considered the $10 million threshold to be too high, and proposed either lower thresholds or no threshold at all.

207. Many interveners, including the Alliance des producteurs francophones du Canada (APFC), the AQPM and the IBG, argued that a $10 million threshold would exclude several online undertakings that contribute in a material manner to the broadcasting system, such as services dedicated to the realities of official language minority communities (OLMC) and Indigenous communities, as well as third-language services, Indigenous services, community services and smaller English- or French-language independent broadcasters.

208. In regard to the proposal to use the same threshold as in the Digital Media Survey, the WGC noted that the threshold was set before the recent amendments to the *Broadcasting Act* were in effect, and that there are now no reasons for the Commission to tie itself to a previous threshold established in a different context under different legislation.

209. The National Campus and Community Radio Association (NCCRA) proposed a threshold of $2.5 million to maximize the number of services required to support the creation and presentation of Canadian programming. In its view, online broadcasters with gross revenues of more than $2.5 million would contribute materially to the implementation of the broadcasting policy set out in the *Broadcasting Act*. It noted that the current CCD contribution framework requires all commercial and ethnic radio broadcasters with more than $1.25 million in annual revenues to make direct financial CCD contributions.

210. Certain interveners proposed different thresholds depending on the type of undertaking. In this regard, ACCORD argued that a $10 million threshold would be too high for the music industry. They added that the current exemptions established by the Commission use different thresholds for audio and video services.

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[37] See Broadcasting Regulatory Policy 2023-329.

[38] See Broadcasting Notice of Consultation 2023-138.

[39] Including the NCCRA, the QEPC, the CMPA, St. Andrews Community Channel Inc. (St. Andrews), and CACTUS.

Commission's decision

211. As noted above, the Commission is applying a lens similar to that found in in subsection 9(4) of the *Broadcasting Act* in establishing the appropriate threshold by which to determine if an undertaking is subject to the conditions of service or not. In other words, it will exclude from the application of the conditions of service those undertakings whose compliance will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.

212. Further, in exercising its mandate, the Commission must also consider the regulatory policy set out in subsection 5(2) of the *Broadcasting Act*. Notably, paragraph 5(2)(g) states that the Canadian broadcasting system should be regulated and supervised in a flexible manner that is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings. Pursuant to paragraph 5(2)(h), the Canadian broadcasting system should also be regulated and supervised in a flexible manner that takes into account the variety of broadcasting undertakings to which the *Broadcasting Act* applies and avoid imposing obligations on any class of broadcasting undertakings if that imposition will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

213. In the Commission's view, it would be possible to apply the conditions of service to all online undertakings, with no threshold at all. This is the approach that was taken under the DMEO, and it did not prove to be administratively impractical for the Commission. The Commission considers the obligations it has identified to be necessary for the basic oversight of the online component of the Canadian broadcasting system. Conversely, setting the threshold too high could exclude a larger number of services, which would impair the Commission's ability to apply basic requirements to services with a material impact on the Canadian broadcasting system.

214. In light of the above, the Commission finds that it would be better positioned to implement the broadcasting policy objectives set out in the *Broadcasting Act* by seeking a balance between requiring small or medium-sized undertakings to comply with the conditions of service and the need to minimize the regulatory burden on small undertakings that do not benefit from the affiliation of a broadcasting ownership group.

215. Several interveners proposed using the threshold established for the Digital Media Survey (for the imposition of the conditions of service and for the requirement to register with the Commission). In the Commission's view, adopting the same threshold used in the Digital Media Survey would be inappropriate given that the purpose of that survey was different than the objective of the conditions of service and, therefore, targeted a different subset of undertakings.

216. A $10 million threshold would include online services offered by a larger number of broadcasting ownership groups, which would include a more representative set of broadcasting ownership groups. A higher level would exclude many medium-sized undertakings, impairing the Commission's ability to fully understand and therefore regulate and supervise these aspects of the broadcasting ecosystem.

217. Further, since the conditions of service would not be overly burdensome, it is reasonable to expect that a $10 million threshold should not deter services from entering the Canadian market, nor should it push those who have reached the $10 million threshold to leave that market.

218. In the context of Broadcasting Notice of Consultation 2023-139, the Commission discussed the use of separate thresholds for English- and French-language markets, and noted that several online undertakings offer English, French and multilingual content. In fact, these online undertakings offer much of their content in multiple languages. It would therefore not be simple or perhaps even possible to distinguish between language-specific revenues from services that operate in both English and French. Consequently, the Commission does not consider that it would be appropriate to establish different exclusion thresholds for undertakings that operate in English or in French markets, particularly in light of the Commission's decision to set the threshold at the broadcasting ownership group level, which could include undertakings operating in English and French.

219. In light of the above, the Commission will impose the conditions of service on broadcasting ownership groups that have $10 million or more in annual Canadian gross revenues, as proposed in the Notice. Such a threshold reflects the fact that smaller players do not have the same impact on the market as do larger players, and avoids imposing obligations on smaller, independent players that do not contribute in a material manner to the implementation of the broadcasting policy.

Video game services

220. In the Notice, the Commission proposed to exempt online undertakings whose single activity and purpose consists of providing video game services. This exemption is also included under excluded revenue, meaning that any revenue that originates from providing video game services is excluded from the annual revenue calculation.

Positions of parties

221. Interveners who commented on this issue[40] generally supported the Commission's proposal to exempt video game services from the conditions of service, with minimal caveats.

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[40] Including BCE, Rogers, the Canadian Broadcasting Corporation (CBC), the DGC, Cogeco, the Entertainment Software Association of Canada (ESAC), the IBG, Warner Bros. Discovery, SiriusXM, APFC, and Unifor.

222. ACCORD, and the Association des réalisateurs et réalisatrices du Québec (ARRQ), the Guilde des musiciennes et musiciens du Québec (GMMQ), the Société des auteurs de radio, télévision et cinéma (SARTEC) and the Union des artists (UDA) (joint intervention, collectively ARRQ-GMMQ-SARTEC-UDA), considered that the exemptions should not be blanket exemptions, and that if an online undertaking carries out broadcasting activities as part of its video game services, this should not result in an automatic exemption. In their view, given that recent developments in the video game services market have overlapped with broadcasting activities, such services act as broadcasters and therefore should not be exempt. The DOC noted that although video game services should be exempt, their service models are adapting to include broadcasting activities that should be monitored by the Commission. It argued that exemption should therefore be monitored going forward to prepare for any changes.

223. The CMF stated that the Commission's definition for "video game" as proposed in the Notice is based on the notion of interactivity between the game and the user, and that this notion does not apply to new immersive online worlds offering XR3 productions[41] involving "passive reception" of sound and visual images. It therefore questioned whether this definition includes augmented reality,[42] virtual reality[43] and mixed reality,[44] and other types of content in the immersive and/or interactive world (collectively referred to here as XR). In its view, confusion is possible because many XR applications might be considered video games, and many video games may be played using virtual reality. It added that several XR applications might not be considered as games because they do not involve active interaction, but rather passive reception of sounds and visual images. In its view, these ambiguities merit consideration for regulation that is responsive to technological developments. The APFC agreed with this position.

224. TikTok considered that the proposed video game services exemption should be broadened in scope. It argued that the concept of "single activity" is too limiting, as there are very few, if any, video game services (or software services) that have no other (ancillary) audio/video streaming activities. As such, TikTok stated that the description of this class of undertaking, as proposed in Appendix 2 to the Notice, be amended to refer to online undertakings whose primary purpose (rather than single activity and purpose) consists of providing video game services. In TikTok's view, this amendment would allow the Commission to exercise flexibility and discretion when it comes to the continually evolving ways that Canadians use these platforms.

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[41] Productions or exhibitions that used all three types (AR, VR, MR) of extended reality. Ex: Immensiva.

[42] Designed to add digital elements over real-world views with limited interaction, such as Pokémon Go (See Microsoft).

[43] Immersive experience helping isolate users from the real word, usually via a headset device and headphones designed for such activities.

[44] Combining augmented reality and virtual reality elements so that digital objects can interact with the real world means businesses can design elements anchored within a real environment.

Commission's decision

225. Aside from the circumstances considered in Public Notice 1995-5 in regard to the Exemption order respecting video games programming service undertakings, set out in the appendix to that public notice, the Commission has historically held the view that the transmission of video games does not constitute broadcasting. The Commission notes that it is not changing that view in the present regulatory policy.

226. However, the Commission notes that video games have evolved considerably and the games themselves may now, or in the future, include some broadcasting activity. Nevertheless, in the Commission's view, online undertakings that provide such video game services currently have a relatively marginal place in the Canadian broadcasting system. Due to the unique nature of video games within the system, the Commission is of the view that, to the extent online undertakings provide video game services, compliance with the conditions of service would not further the policy objectives of the *Broadcasting Act* at this time. The Commission notes that excluding video game services, to the extent that they can be called online undertakings, would be consistent with the proposed Direction, which directs the Commission to not impose regulatory requirements on broadcasting undertakings in respect of the transmission of video game services.

227. With respect to online undertakings that provide video game services in addition to other broadcasting services, the Commission considers that it would be important to make such online undertakings subject to the conditions of service. The rationale for excluding video game service providers does not apply if there are other broadcasting services being provided. Indeed, such online undertakings may well generate significant revenues from VOD services, for example. Accordingly, the Commission finds that it would not be appropriate to amend the class of undertakings to which the conditions of service do not apply, as proposed by certain interveners, to exclude online undertakings whose primary purpose consists of providing video game services. Nevertheless, the Commission notes that revenues derived from providing video game services are included in the definition of "excluded revenue" and are therefore excluded from the calculation of "annual revenues" used for the purpose of determining whether an online undertaking is subject to the conditions of service.

228. The Commission therefore finds that compliance with the conditions of service by online undertakings whose single activity and purpose is the provision of video game services would not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.

229. In light of the above, the Commission has retained the exclusion for online undertakings whose single activity and purpose consists of providing video game services, as proposed in the Notice.

230. The Commission intends to continue monitoring the sector as it evolves.

Unique transactions

231. In the Notice, the Commission proposed exempting from the conditions of service online undertakings whose single activity and purpose consists of providing unique transactions. In the proposed order, the Commission defined "unique transaction" as a one-time rental or purchase of an individual program transmitted or retransmitted over the Internet.

Positions of parties

232. Interveners who supported[45] the proposed exemption noted that these unique transaction services are a digital evolution of the "brick and mortar" music and video stores, which were not previously subject to the Commission's regulatory requirements. These interveners expressed concern over the potential impacts that imposing the conditions of service on transaction-based services may have on these services. In this regard, Amazon noted that revenues of transaction-based services are declining relative to subscription-based streaming services. It also noted, as did BCE, that those services already contribute to the system through investments of time and money in content creation, promotion and interaction with consumers.

233. Apple, Amazon and the ITIC urged the Commission to follow the proposed Direction to adopt equitable regulation that accounts for the nature of an undertaking. Apple noted that the transactional nature of purchasing or renting music or videos affords less control over the content, given the reliance on third parties. The interveners argued that the transactional video-on-demand (TVOD) business model is different than the subscription business model, which operates on a curation model driven by relationships with their rights holders and customer base.

234. According to the ITIC, unique transaction services such as TVOD services are primarily content marketplaces, rather than services that carry on a broadcasting activity, and work on a unique business model. It echoed other parties' concerns over the potential imposition of excessive regulatory obligations on services that fall beyond the core scope of the broadcasting policy, as well as the potential implications for the public's perception of the regulatory system as a whole in Canada.

235. The Ultimate Fighting Championship (UFC) supported the proposed exemption and sought further clarity on the definition of a one-time rental or purchase of an individual program. It voiced concerns about how its revenues may be calculated for the purpose of determining whether it can be exempted. Similarly, the MPAC, though in favour of the proposed exemption, sought more information as to why the exemption was specific only to this model while other models (e.g., free ad-supported television [FAST], subscription-based VOD [SVOD] and advertising-based VOD [AVOD]) also exist.

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[45] Including Amazon, Apple, BCE, Eastlink, Cogeco, Cineplex Entertainment LP, the ITIC, the MPAC, Rogers, and the Ultimate Fighting Championship.

236. A greater number of interveners opposed[46] the proposed exemption. They considered that the Commission did not provide sufficient rationale for exempting those services, and sought further clarification on the Commission's intent and rationale, and supporting evidence, for excluding this group of services from the conditions of service. Interveners argued that these services make a material contribution to the broadcast system since they are a key access point to feature films for large Canadian audiences, are growing in size and number,[47] and generate significant revenues.[48]

237. Other interveners[49] submitted that it is too early to exempt unique transactions given their size and impact. The DGC noted that much of TVOD service revenues are generated by global companies that are well positioned to support the creation, distribution and presentation of Canadian programming, and that TVOD services are but one of many services offered by the same online undertaking and should not be overlooked.

238. Interveners also submitted that regulatory approaches should be consistent with the objectives of the *Broadcasting Act* for the fair and equitable treatment of players in the broadcasting system, and that technology used to deliver the programming should not be the deciding factor in exempting them from the conditions of service. Interveners including the Canadian Broadcasting Corporation (CBC), Corus, the CPSC-SCFP, the DGC, the DOC, PIAC, Quebecor and Téléfilm Canada considered unique transaction services to be similar to currently licensed BDUs that offer TVOD services and currently fall under the Commission's regulatory requirements. As such, they questioned why unique transactions online should be treated differently. TELUS also noted the need for regulatory symmetry, and proposed extending the exemption to licensed VOD services.

239. The DOC and the APFC, noting that the *Broadcasting Act* specifically states at paragraph 3(1)(e) that "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming," argued that excluding a significant element of the Canadian broadcasting system at this early stage does not seem to be an appropriate action. Saskatchewan Telecommunications (SaskTel) added that the only difference between online VOD services and the on-demand services provided on traditional broadcast platforms is the provision of content via a managed network instead of over the Internet.

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[46] Including the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the APFC, the AQPM, ARRQ-GMMQ-SARTEC-UDA, the CMF, the CMPA, the CBC, Corus, the CPSC-SCFP, the DGC, the DOC, PIAC, Quebecor, the Racial Equity Media Collective, St. Andrews, Téléfilm Canada, The Ontario Educational Communications Authority (TVO), Unifor, Vaxination Informatique, and the WGC.

[47] Current examples of this type of service include Illico, iTunes, Microsoft Movies & TV, Google Play, PlayStation Network, CinemaNow, Cineplex Store, Amazon Instant Video and YouTube Premium.

[48] TVOD services as a whole operating in Canada had estimated revenues of $320.7 million in 2020, higher than revenues of other groups currently being regulated. They also noted TVOD services' double digit compound annual growth rate.

[49] Including the APFC, the CMPA, the DOC, Téléfilm Canada and the WGC.

240. The CAB also requested regulatory symmetry, and considered that TVOD services both on traditional broadcast platforms and online should be either regulated or unregulated. It recognized, however, as did Cogeco, that there is no parallel in the broadcasting system for online undertakings that sell music on a transactional basis, and argued that it would therefore be appropriate to exempt such services. Unifor submitted that method or frequency of payment (subscription fee versus one-time rental) should not be a determining factor in regard to whether or not a service should be exempted.

241. Finally, the CBC and the CMPA noted that models will continue to evolve. The CMPA, which adopted its comments in response to Broadcasting Notice of Consultation 2023-139 in regard to unique transactions, further noted the risk that online undertakings, with their flexibility of developing consumer offers, will broaden the application of any exemption by categorizing subscription activity as being transactional in nature (as demonstrated by Amazon's initial request to expand the exemption to subscriptions). They also noted the risk of traditional BDUs requesting an exemption of VOD services in the name of equitability. In this regard, BCE, the CAB, Cogeco, Quebecor and SaskTel, all of whom opposed the exemption, stated that they would all seek regulatory equity for traditional BDUs if the Commission proceeds with the exemption. In their view, the lack of regulatory obligations imposed on unique transaction online undertakings would create an unjust and unfair advantage for those undertakings.

Commission's decision

242. As noted above, the issue here is whether the Commission should exercise its power to exclude from the application of the conditions of service undertakings that transmit or retransmit programs over the Internet for reception by the public by means of broadcasting receiving apparatus if the programs are "rented" for a one-time viewing or "purchased" once to allow for access on an ongoing basis. This type of service is described herein as a "unique transaction service".

243. As a result of this proceeding, it appears to the Commission that the overall market in Canada for unique transaction services provided by online undertakings, while divided among a number of players, can be considered significant. In light of this, the Commission considers it premature to exclude these services from the conditions of service, as proposed, as doing so could mean that the Commission would not be able to collect information and ensure that some measure of basic regulatory oversight is maintained during this transition period. This could have significant ramifications for its ability to implement the broadcasting policy objectives set out in the *Broadcasting Act*.

244. The Commission notes that the business models for broadcasting, along with the technology, have continuously evolved over the course of the history of broadcasting. Whether scheduled only or on demand; advertising or subscription-based; VOD or pay-per-view (PPV); or payment for ongoing access to the program, it is neither the payment method nor the moment in which the public can access (or

re-access) a program, but the fact that these services all involve the transmission of programs by means of telecommunications for reception by the public by means of broadcasting receiving apparatus that makes them significant from the perspective of the broadcasting policy for Canada.

245. Fundamentally, the broadcasting policy for Canada does not specifically distinguish between scheduled and on-demand broadcasting, or between subscription or transaction-based services. Indeed, the Commission is tasked with exercising its powers in a manner that, among many other things, is readily adaptable to technological change and that takes into account the diversity of the services provided by broadcasting undertakings.

246. The Commission recognizes that online undertakings and BDUs provide their unique transaction services under different circumstances – transmission by online undertakings over the Internet rather than by BDUs over managed networks – and differ in regard to the nature of the relationship with their customers. Further, BDUs may provide one-time transactions through the use of specific hardware and software provided by the BDU as part of the subscription service offered to the customer. Nevertheless, it is the similarities of the services that are important from the perspective of implementing the policy objectives set out in the *Broadcasting Act*, and specifically here adherence to the conditions of service to implement these objectives. The unique transaction services offered by BDUs and online undertakings offer a catalogue of programs available to customers: both types of undertakings exercise control over programming as they decide which content is offered, and may set the price charged to the customer for accessing the content. Moreover, services provided by online undertakings that involve "renting" the program for one-time viewing are akin, in particular, to the VOD and PPV services offered by BDUs. Therefore, excluding from the application of the conditions of service online undertakings that provide unique transaction services merely because they transmit or retransmit the programs by means of the Internet would result in unjustifiable regulatory asymmetry between traditional and online services.

247. Moreover, the Commission considers the ability to request information from online undertakings that provide unique transaction services, given the nature of the services and their increasing size and number, to be an essential tool as it works to develop a new regulatory framework for online undertakings.

248. Finally, the Commission notes that excluding from the application of the conditions of service online undertakings providing unique transactions services – i.e., based primarily on the method of payment – could unintentionally and inappropriately lead to a shift toward providing services in this fashion in order to qualify for such exclusion.

249. In light of all of the above, the Commission concludes that excluding from the application of the conditions of service the class of online undertakings that provide unique transactions services could have a material impact on its ability to

implement the objectives of the *Broadcasting Act*, including, for example, those set out in paragraphs 3(1)(a.1),[50] 3(1)(f.1),[51] 3(1)(q),[52] and 3(1)(r)[53] of that Act.

250. The Commission therefore finds that it is premature to exclude from the conditions of services online undertakings that provide unique transaction services. In the Commission's view, the better course would be to make such undertakings subject to the conditions of service so as to permit the Commission to be better able to monitor their development and examine in the context of future proceedings how such services should be treated. The Commission has amended the order accordingly.

251. The Commission notes that other jurisdictions are struggling with the same questions and that some have taken the view that transactional services should be captured within the scope of broadcasting regulation. As of March 2023, all EU states have implemented the Audiovisual Media Services Directive (AVMSD) and currently regulate VOD services in some form. There is some flexibility in the way in which the AVMSD may be implemented, but many member states have implemented quotas for EU and national content, and some have elected to apply investment obligations.[54]

252. In light of the above, the Commission finds that compliance with the conditions of service will contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*. The Commission therefore finds that it is not necessary, and would not be appropriate, to exclude from the application of the conditions of service online undertakings that provide unique transaction services. Accordingly, the Commission has made online

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[50] 3(1)(a.1): "It is hereby declared as the broadcasting policy for Canada that […] each broadcasting undertaking shall contribute to the implementation of the objectives of the broadcasting policy set out in this subsection in a manner that is appropriate in consideration of the nature of the services provided by the undertaking;"

[51] 3(1)(f.1): "It is hereby declared as the broadcasting policy for Canada that […] each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;"

[52] 3(1)(q): "It is hereby declared as the broadcasting policy for Canada that […] online undertakings that provide the programming services of other broadcasting undertakings should

(i) ensure the discoverability of Canadian programming services and original Canadian programs, including original French language programs, in an equitable proportion,

(ii) when programming services are supplied to them by other broadcasting undertakings under contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iii) ensure the delivery of programming at affordable rates;"

[53] 3(1)(r): "It is hereby declared as the broadcasting policy for Canada that […] online undertakings shall clearly promote and recommend Canadian programming, in both official languages as well as in Indigenous languages, and ensure that any means of control of the programming generates results allowing its discovery;"

[54] For further information about international requirements on VOD, please refer to the Commission's webpage.

undertakings whose single activity and purpose consist of providing unique transactions subject to the conditions of service.

Social media services

253. The *Broadcasting Act* distinguishes between the content uploaded by users of social media services, the persons who upload content, and the social media services themselves.[55]

254. Subsection 4.1(1) of the *Broadcasting Act* stipulates that the Act does not apply in respect of a program that is uploaded to an online undertaking that provides a social media service by a user of the service for transmission over the Internet and reception by other users of the service. However, as set out in subsection 4.1(2), despite subsection 4.1(1), the *Broadcasting Act* does apply in respect of a program that is uploaded as described in that subsection if the program (a) is uploaded to the social media service by the provider of the service or the provider's affiliate, or by the agent or mandatary of either of them; or (b) is prescribed by regulations made under section 4.2 of the *Broadcasting Act*.

255. The *Broadcasting Act* also does not apply to the person who uploads such content insofar as they are deemed under subsection 2(2.1) not to be carrying on a broadcasting undertaking. Specifically, a person who uses a social media service to upload programs for transmission over the Internet and reception by other users of the service — and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them — is deemed not, by the fact of that use, to carry on a broadcasting undertaking for the purposes of the *Broadcasting Act.*

256. Further, subsection 4.1(3) of the *Broadcasting Act* stipulates that the Act does not apply in respect of online undertakings whose broadcasting consists only of programs in respect of which the *Broadcasting Act* does not apply under this section.

Positions of parties

257. While interveners agreed that the content uploaded by users on social media is not covered by the *Broadcasting Act*, there was disagreement as to whether social media platforms, which may contain broadcasting programs in addition to social media content, should be excluded from the application of the conditions of service.

258. Most associations, including the CAB and ACCORD, argued that social media platforms such as Facebook (owned by Meta), TikTok, and YouTube (owned by Google) directly compete with radio and television services for content, audience, and advertising. As such, these interveners, along with the CMPA and the IBG, opposed exempting social media services from the conditions of service. They also noted a distinction between regulating the individual users of social media services (i.e., creators) and regulating social media services.

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[55] The proposed Direction also references "social media creator," a new term not included in the *Broadcasting Act*.

259. The IBG noted that paragraph 3(1)(q) of the *Broadcasting Act*, which was added following the coming into force of the *Online Streaming Act*, includes broadcasting policy objectives that relate specifically to online undertakings that provide the programming services of other broadcasting undertakings. For the IBG, "numerous other objectives and powers of the Commission could be exercised only in relation to service aggregators, which are poised to become the BDU[s] of the future."

260. Other interveners, including Digital First Canada, Google, Meta, TikTok, the ITIC and Vaxination Informatique and others, supported the exemption of social media platforms altogether from the conditions of service.

261. Meta supported this claim and explained that social media platforms have no material impact on the Canadian broadcasting system. It argued that these platforms are not like traditional television since they do not select programs and since the volume of content is not limited by a few available channels, nor do they produce and/or distribute professionally produced programming pursuant to commercial carriage agreements.

262. Meta further submitted that the *Broadcasting Act* does not apply to social media online undertakings whose broadcasting consists of programs of social media creators.[56] It argued that its services are primarily not broadcasting, and that any programs that might be considered to be broadcasting are the creations of its users, who are social media creators. Further, Meta argued that the broadcasting activities on its services are minimal and entirely ancillary to the predominant purpose of its services, which is to help people connect with friends and family, to help build communities and to help grow businesses.[57] It also argued that many of the conditions of service proposed would make sense as applied to platforms that primarily host user-generated content.

263. According to TikTok, if video game services are exempted because they are not broadcasting, social media content, which has never been considered broadcasting, must also be exempted to avoid any ambiguity. Although the intervener agreed that social media services could provide content that is also available through a licensed or registered broadcasting undertaking, it argued that this should not preclude the exemption of these services. In TikTok's view, the determinative factor should be whether the primary function of the social media service is to access social media content. It therefore proposed exempting online undertakings whose primary purpose consists of providing a social media service.

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[56] Meta cited subsection 4.1(3), which declares that the *Broadcasting Act* does not apply in respect of online undertakings whose broadcasting consists only of programs in respect of which that Act does not apply, and subsection 4.1(1), which declares that the *Broadcasting Act* does not apply in respect of programs that is uploaded to an online undertaking that provides a social media service by a user of the service.

[57] In this regard, Meta cited paragraph 2(2.3)(a) of the *Broadcasting Act*, which declares that a "person does not carry on an online undertaking for the purposes of this Act in respect of a transmission of programs over the Internet that is ancillary to a business not primarily engaged in the transmission of programs to the public and that is intended to provide clients with information or services directly related to that business."

264. Google also considered that online undertakings of which the primary function is to serve as a platform for the dissemination of user-generated content, namely, social media services, should not be subject to the same regulatory framework as that for traditional broadcasting undertakings. It added that exempting social media services would be consistent with the Commission's statement that it does not intend to regulate any aspect of a social media service, and that this was the clear intention of Parliament.

265. Vaxination Informatique submitted that, whatever the business model of a social media platform, any requirement imposed would ultimately be passed on to social media creators. As a consequence, creators would be harmed through a reduction in revenues.

266. The ITIC supported the exemption of social media platforms hosting user-generated content given that such platforms lack editorial control and do not exert any programming control over broadcast content. It added that exempting undertakings that provide social media services would be consistent with the proposed Direction, avoid potential unintended consequences that could impact Canadian consumers, and reflect the Government of Canada's legislative intent.

267. Finally, an individual intervener warned that a regulatory framework that uses a content-based approach risks turning the Commission into a content moderator, making specific decisions about the types of content that are covered by the *Broadcasting Act*.

Commission's decision

268. In assessing whether to make social media platforms subject to the conditions of service, the Commission again applied the lens provided through subsection 9(4) of the *Broadcasting Act* as a guide.

269. It appears clear at this point that social media platforms play a large and increasingly dominant role in terms of the Canadian online broadcasting advertising market. This alone would seem to point towards a need to require such services to comply with the conditions of service, to enable the Commission to gather further information and monitor their impact, where necessary. In addition, excluding all or a subset of online undertakings that provide social media services would require that the class of undertakings to be excluded be clearly defined. Through the proceeding initiated by Broadcasting Notice of Consultation 2023-138,[58] the Commission has only just begun to explore the concept of social media and the role, if any, that social media platforms may play in the broadcasting system, should they engage in activities that are subject to the *Broadcasting Act*. That proceeding is only a first step – future proceedings will likely be necessary to delineate more clearly a regulatory approach to these services.

[58] In that notice of consultation, the Commission announced the launch of a three-step process to establish a modernized regulatory framework regarding contributions to support Canadian and Indigenous content.

270. Given the ongoing proceedings considering various issues surrounding the definitions of social media services and their activities that are subject to the *Broadcasting Act*, the Commission considers that it would be premature to define a class or classes of online undertakings specific to social media undertakings for the purposes of excluding them from the application of the conditions of service. More importantly, even if there were such clarity on definitions, the Commission considers that, in particular, the information gathering condition of service is essential at this point in the development of the Commission's new regulatory framework under the amended *Broadcasting Act*. To the extent that certain conditions of service may not be directly applicable to the business models of social media services that are subject to the *Broadcasting Act*, the Commission does not consider that the imposition of these conditions of service will interfere with existing business models. Taking into account the Commission's objective of maintaining the status quo and the minimal regulatory burden imposed by the conditions of service, the Commission finds that imposing these conditions on social media services that are subject to the *Broadcasting Act* would be appropriate.

271. In light of the above, the Commission finds that it is neither necessary nor appropriate at this time to exclude online undertakings that provide social media services from the application of the conditions of service. Inclusion of online undertakings that provide social media services in the conditions of service may need to be reviewed in the future once the Commission has collected sufficient information on these services, and once it has provided more clarity and resolved a variety of issues concerning these services. Finally, for the sake of clarity, the conditions of service only apply to those social media online undertakings that are subject to the *Broadcasting Act* and, further, do not apply to users of social media services.

Content-related categories

Thematic services

Positions of parties

272. For the purposes of the present proceeding, the MPAC introduced the concept of "thematic service," which it defined as a service that due to its nature or theme of service will not contribute in a material manner to the implementation of the broadcasting policy objectives of the *Broadcasting Act*, and should therefore be given special consideration by the Commission (i.e., should be exempted from the conditions of service).

273. According to the MPAC, the Commission should only exempt a thematic service if it is satisfied that it will not contribute in a material manner to the implementation of the broadcasting policy set out in the *Broadcasting Act*. The UFC proposed an exemption class for undertakings that, due to the inherent nature of the content they offer, do not compete with Canadian services or do not materially impact the Canadian broadcasting industry.

274. Certain interveners opposed exempting “thematic services” as defined by the MPAC. The CMPA expressed concerns that such an exemption category would lack specificity and be a blanket exemption. Corus also took issue with the MPAC’s definition of thematic services and its proposal to exempt such services from the conditions of service, stating that the intervener did not provide any limiting principle or other supplementary interpretive guide, and that adoption of such a proposal could lead to regulatory uncertainty and inequity.

275. The CAB also expressed concern over the proposals to exclude broad categories of services, arguing that thematic and ad-support programming services directly compete with television and radio services for content, audiences and advertising.

276. According to the CMPA, exemption status is not necessary for specific programming genres of a service given that the Commission has proposed a threshold based on a level of revenues that, when met, indicates that a service has the potential to contribute in a material manner to the policy objectives, and therefore should be subject to regulation regardless of content.

277. An individual intervener submitted that a content-based exemption approach could risk turning the Commission into a content moderator, and that adding further regulatory requirements depending on the content provided would make the Commission determine which content should be exempted.

278. Finally, Vaxination Informatique stated that the Commission must, as a first step, properly define “broadcasting” to include only what it intends to include in its regulations rather than creating broad terms and then exempting specific activities that will continue to evolve and cause the regulations to be outdated.

Commission’s decision

279. Excluding any kind of content based on its theme would require assessing such content, which involves a certain level of subjectivity. Further, exclusions based on content would provide some uncertainty to online broadcasters, as well as utilize significant resources from both online broadcasters and the Commission to process.

280. Further, the Commission considers it premature to carve out too many additional categories of service from the application of the conditions of service. Excluding a broad category such as thematic services, particularly one that has not yet been defined by the Commission, could result in a significant segment of the broadcasting sector operating without any conditions of service in place while the Commission develops its new regulatory framework under the amended *Broadcasting Act*. It would also make it more difficult for the Commission to determine whether thematic services are contributing to the achievement of paragraphs 3(1)(k) and 3(1)(p.1) of the *Broadcasting Act*.

281. In light of the above, the Commission finds that it would not be appropriate to exclude the broad category of thematic services as defined by MPAC from the application of the conditions of service.

Online news services

Positions of parties

282. The CAB proposed that the Commission explicitly exempt online news services so that there is no distinction between news providers whose programming consists predominantly of alphanumeric text and those who would be considered to be broadcasting audio or video "programs". It argued that this would also keep the Commission from having to measure and track the point at which a website becomes mainly textual, and therefore lies outside of the scope of the *Broadcasting Act*. The CAB also noted that a broadcaster's website is generally made up of content created for its linear channels, which is already subject to the Commission's oversight. Other interveners, including Rogers, BCE, Corus, Apple and an individual, supported the CAB's proposal.

283. Corus urged the Commission to exempt online news for competitive reasons. It noted that online news sites associated with licensed news broadcasters compete with the online news sites of print publications and international media organizations. Corus considered that it is not the Commission's intent to regulate websites such as those for the *Globe and Mail*, and that the playing field should therefore be level for news sites associated with Canadian broadcast news organizations.

284. BCE submitted that such an exemption would be in the public interest. It argued that there is no need to ensure these undertakings contribute to Canadian culture since they do so by definition, by providing news and stories that cover Canada and the world. BCE raised a point similar to that of the CAB in that regulation may create a disparity of treatment between online providers who offer mostly videos versus those who offer mainly text. Rogers and Apple agreed with this rationale.

285. The WGC opposed exempting online news services from the conditions of service. It considered that the Commission is only gathering information and not imposing specific regulatory obligations, and that there is therefore no reason to exclude online news. The WGC noted that the Commission's rationale for requiring such services to comply with the conditions of service is that such information increases the public transparency applicable to such services and it informs the Commission's substantive regulatory decisions that may follow.

286. The IBG also disagreed with the proposal to exempt online news services from the conditions of service.

287. The CMPA disagreed with exempting online news services as well. It argued that an exemption is not necessary for specific programming genres of a service given that the Commission proposed a threshold based on a level of revenues that, when met, would indicate that a service has the potential to contribute in a material manner to the policy objectives and should therefore be subject to regulation, regardless of content.

Commission's decision

288. There are a variety of news services that are not covered by the *Broadcasting Act* or are otherwise exempted by the Commission. For example, print-media undertakings fall outside the scope of the *Broadcasting Act*, as the Commission's authority under that Act extends only to broadcasting undertakings. Further, online news services that do not broadcast programs, but rather only content that consists predominantly of alphanumeric text, are excluded.[59]

289. In addition, subsection 4(5) of the *Broadcasting Act* stipulates that the *Broadcasting Act* does not apply to the operator of a digital news intermediary[60] in respect of which the *Online News Act* applies when the operator acts solely in that capacity. Finally, online undertakings whose operator either forms or does not form part of a broadcasting ownership group, with broadcasting revenues under the $10 million threshold, would not be subject to the conditions of service.

290. The Commission notes that the above-noted news services would not be subject to the conditions of service given that they either fall outside the scope of the *Broadcasting Act* or would be excluded from the application of the conditions of service based on their annual revenues.

291. Nevertheless, other broadcasting undertakings, including online undertakings that provide audio and video news services subject to the *Broadcasting Act*, are of primary concern for the Commission. In fact, the *Broadcasting Act* sets out specific policy objectives regarding news (see, for example, subparagraphs 3(1)(i)(ii.1)[61] and (iv)).[62] Further, as set out in section 12(i) of the proposed Direction, the Commission would be required to consider the importance of sustainable support by the entire Canadian broadcasting system for news and current events programming, including a broad range of original local and regional news and community programming.

292. Online news undertakings that are not part of a broadcasting ownership group are not subject to the conditions of service when they have broadcasting revenues under the $10 million threshold. For online news undertakings that, in addition to

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[59] This is because the definition of "program" in the *Broadcasting Act* excludes visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

[60] As defined by the *Online News Act:* means an online communications platform, including a search engine or social media service, that is subject to the legislative authority of Parliament and that makes news content produced by news outlets available to persons in Canada. It does not include an online communications platform that is a messaging service the primary purpose of which is to allow persons to communicate with each other privately.

[61] The programming provided by the Canadian broadcasting system should include programs produced by Canadians that cover news and current events – from the local and regional to the national and international – and that reflect the viewpoints of Canadians, including the viewpoints of Indigenous persons and of Canadians from Black or other racialized communities and diverse ethnocultural backgrounds.

[62] The programming provided by the Canadian broadcasting system provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern and to directly participate in public dialogue on those matters including through the community element.

transmitting or retransmitting audio and/or video news, also provide content that consists predominantly of alphanumeric text (which is not broadcasting), only their broadcasting revenues are to be included in the annual revenue calculation. Accordingly, certain online news undertakings may not reach the $10 million threshold, and those undertakings would be excluded from the conditions of service.

293. In regard to the intervention by Corus, the main difference between the two types of services is that the Commission has regulatory oversight over broadcast news but not over printed news. As such, the competitive differences between the two types of services may not necessarily be levelled as proposed by Corus, by simply not regulating the entities.

294. The proposed Direction directs the Commission to consider the importance of sustainable support by the entire Canadian broadcasting system for news and current events programming. Further, as stated in Broadcasting Regulatory Policy 2016-224, a "vibrant and dynamic news ecosystem is one of the cornerstones of any democracy, since it permits citizens to remain informed of matters of public concern and thus enables their participation in the democratic system." In the Commission's view, excluding news services, both national and international, from the application of the conditions of service would prevent it from having an adequate understanding of the players providing news services and maintaining a basic level of behaviour, which in turn would prevent the achievement of the policy objectives of the *Broadcasting Act* and be inconsistent with the proposed Direction.

295. In light of the above, the Commission finds that it would not be appropriate to exclude online undertakings that provide news services from the application of the conditions of service. The Commission notes, however, that online undertakings that fall under one of the categories described in paragraphs 288, 289 and 292 are already excluded from regulation under the *Broadcasting Act* and would therefore not need to comply with the conditions of service.

Adult content websites

Positions of parties

296. 9219-1568 Québec inc. (doing business as Entreprise MindGeek Canada) proposed that the Commission exempt adult content websites from the conditions of service given that such content is not an expression of Canadian cultural identity that Canadians expect the federal government to protect. It proposed amending the proposed exemption order by adding as exempted services "online undertakings whose dominant activity and purpose consists of providing explicit adult video streaming services."

297. The Société de télédiffusion du Québec (Télé-Québec) supported exempting adult content and noted that several countries, such as Spain and France, exempt services devoted to violent or pornographic content.

Commission's decision

298. Adult content is part of the current broadcasting system, and certain regulatory measures are currently in place for service providers providing such content that operate via traditional broadcasting undertakings. These measures focus on protecting children from such content and ensuring that such content is only available to those adults who wish to deliberately access it.[63] The Commission considers that it would be asymmetrical to exclude online services that provide adult content, while traditional broadcasters offering such content remain regulated. Further, the record of the proceeding shows that the resources employed in the operations of these service providers are not insignificant and that they generate substantial advertising and subscription revenues.

299. Clearly, whether offered online or by traditional broadcasters, adult content is substantially different from other content offered by broadcasting undertakings and, therefore, requires different regulatory approaches. Specifically, the Commission sees little likelihood that regulation governing Canadian content levels or promotion of content would be necessary in furtherance of the objectives of the *Broadcasting Act.* However, as in the traditional broadcasting system, there are several forms of regulatory intervention that are likely warranted in regard to online undertakings that broadcast adult content programs, which will require substantive action on the part of the Commission. For example, the Commission may examine ways to ensure that children are protected. That said, the record of this proceeding is not sufficient for the Commission to make any specific determinations on what form of regulatory action, if any, would be appropriate. Moreover, there are limits set out in the *Broadcasting Act* in regard to the Commission's authority to act in this space. Issues, such as those set out above, related to online undertakings offering adult content will be addressed in future proceedings.

300. In light of the above, the Commission finds that it would not be appropriate, for the time being, to exclude online undertakings that provide adult content from the application of the conditions of service.

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[63] See, for example, the definition of "adult programming service" in the *Broadcasting Distribution Regulations*, as well as subsections 25(1) and (2), which speak to the distribution of such services. Also, in the appendix to Broadcasting Regulatory Policy 2017-138, the Commission set out expectations (8 and 9) for licensees who operate adult programming services to provide a copy of their internal policies as they relate to such programming, and to adhere to such policies. Further, Broadcasting Public Notice 2003-10 approved a new industry code of programming standards and practices governing pay, PPV and VOD services. This code contains provisions to ensure that only adult programs that have been approved and rated by a provincial film classification board will be broadcast, that licensees will review all adult programming prior to broadcast to ensure that such programming is consistent with the licensees' internal policies on adult programming, and that viewers and subscribers will be informed of the nature of the adult programming being aired throughout the purchase, selection and viewing of such programming.

Podcasts

Positions of parties

301. Certain interveners proposed a specific exemption for podcast services. Apple, adopting submissions that it made in response to Broadcasting Notice of Consultation 2023-139, submitted that regulating podcast services (such as Apple Podcasts) would not contribute in a material manner to the implementation of the broadcasting policy of the *Broadcasting Act*. It added that the Commission has expressly stated its intention not to regulate podcasters.

302. Spotify submitted that regulating podcasts would not materially contribute to the implementation of the objectives of the broadcasting policy of the *Broadcasting Act*. It noted that podcasts services are still a nascent field and cannot absorb costs, and that regulating them would constrain this still-evolving medium. Spotify added that imposing revenues on podcasts would be taking from an emerging industry to fund a legacy industry. It submitted that podcasts are defined by their low barriers to entry, and that the lack of regulation provides a space for free expression. In Spotify's view, podcasts are still an emerging form of expression, and regulation risks stifling innovation.

303. Google reiterated that even if a specific activity or service lies within the scope of the *Broadcasting Act*, it is appropriate that certain other services offered by online undertakings should be exempt from regulation even if that online undertaking provides other services that do not fall under the exemption criteria. It referred to Spotify's submission in which it stated that podcasts and audiobooks should be exempted from the conditions of service even though music services fall within the scope of the *Broadcasting Act*.

304. The ITIC also considered that user-generated content should be exempt from the conditions of service. Both Unifor and the DiMA supported exempting podcasts, with the DiMA stating that podcasts fall outside the target for online streaming activities.

305. Other interveners, however, opposed the exemption of podcasts from the conditions of service. The CAB considered that exempting podcast services would open the door too wide for other undertakings to be exempt. It added that podcasts compete directly with television and radio services for content, audiences and advertising. In the CAB's view, there is no reason to expand the classes of exemption.

306. Corus stated that it is premature to exempt all podcast services from the conditions of service. It considered that podcasting clearly falls within the definition of programs and broadcasting, and that platforms that distribute podcasting are presumptively online undertakings. Although Corus acknowledged that many podcasts are uploaded by users, it noted that the market also includes many podcasting programs that are directly produced or exclusively licensed by podcasting platforms for release on said platforms. In Corus's view, there is a significant difference between user-generated podcasts and professional enterprises

that directly compete with licensed radio stations for audiences and revenues. As an example, it referred to the multi-year licensing deal with Joe Rogan to bring "the Joe Rogan Experience" on an exclusive basis to a platform, reported to have been valued at over $200 million U.S.

307. Rogers and ADISQ considered that podcast services should not be exempt from the conditions of service. Rogers stated that although the proposed Direction would direct the Commission not to impose regulatory requirements on online undertakings in respect of the programs of social media creators, including podcasts, it is clear that it would allow and enable the Commission to regulate social media platforms insofar as they are acting like broadcasters. It argued that the intent of the proposed Direction is to ensure that the revenues of social media creators, including podcasters, are not captured by the regulatory framework, the same way that revenues of independent producers are not currently captured. Further, Rogers addressed Apple's intervention in regard to its two different business models. It submitted that when Apple merely links a listener to an external URL where the audio content is hosted, it should not be captured by the conditions of service because it is not engaged in the transmission or retransmission of content, but that when Apple hosts podcasts on its servers and these are transmitted to the listeners, it acts as an online undertaking and its revenues should be captured.

Commission's decision

308. A podcast generally refers to a digital audio file, containing, for example, news or radio-type programming created by a user or a broadcaster that can be downloaded to a personal media device for subsequent listening. Podcasts can be produced by social media users or professionals, and delivered on different types of platforms, each having a different business model. Examples of what constitute "podcasts" include the following:

- streaming services that host the content;
- paid podcasts, where a creator pays a platform that then distributes the content; on such platforms, the content can be accessed by listeners for a fee;
- free podcasts in which a platform is merely a directory of podcasts such as that provided by streaming platforms;
- advertising-based podcasts created by individuals on their own websites, or on membership platforms that allow podcasters to run a subscription service; and
- podcasts available on social media platforms.

309. The *Broadcasting Act* defines "program" as sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

310. Based on this definition, the Commission finds that podcasts constitute programs under the *Broadcasting Act*, given that they are comprised of sounds intended to inform, enlighten or entertain. Further, based on the definition of "broadcasting" set out in subsection 2(1) of the *Broadcasting Act*, the Commission finds that the transmission of podcasts over the Internet, a means of telecommunication, constitutes broadcasting when, as is typically the case, such transmission is for reception by the public by means of broadcasting receiving apparatus such as a computer, tablet or wireless phone.

311. As noted above, the *Broadcasting Act* defines "broadcasting undertaking" as including an online undertaking, which is, in turn, defined as an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus.

312. The Commission finds that where the undertaking is hosting or distributing the podcasts, it is engaged in the transmission or retransmission of programs (podcasts) over the Internet for reception by the public by means of broadcasting receiving apparatus (computer/tablet/wireless phone). The Commission therefore concludes that online undertakings that host or distribute podcasts transmitted or retransmitted over the Internet to the public for reception on their phones, computers, tablets or other broadcasting receiving apparatus are carrying on "online undertakings" as defined in the *Broadcasting Act*.

313. The Commission considers that where an undertaking is only providing a directory of podcasts that does not host or distribute, the undertaking is not engaged in the transmission or retransmission of programs over the Internet; rather, its function is more akin to a program guide. Accordingly, such an undertaking is not carrying on an online undertaking, and therefore the conditions of service would not apply.

314. The Commission further notes that the conditions of service would also not apply to individuals and online undertakings that are specifically excluded from the *Broadcasting Act*:

- a person that uploads a podcast (or any program) to a social media service (if that person is not the provider of the service or the provider's affiliate, or agent or mandatory of either of them); or
- an online undertaking providing a social media service that only hosts or distributes podcasts (or any other program) excluded from the *Broadcasting Act* by virtue of section 4.1 of that Act. Excluded programs, including podcasts, cover those that are uploaded by individual users of the social media service (and not uploaded by the provider of the service or the provider's affiliate, or agent or mandatory of either of them) and not otherwise prescribed by the Commission.

315. Individuals that host podcasts on their own websites or make them available on a subscription service platform other than a social media service are not explicitly excluded from the *Broadcasting Act* under subsection 2(2.1). Nevertheless, the Commission expects that such individuals (i.e., individuals that transmit or

retransmit their podcasts through their own websites, or that otherwise upload their podcasts to a service available on the Internet) would not be subject to the conditions of service because their annual revenues, in most likelihood, would be below the proposed threshold.

316. There are a variety of podcasts that can provide a wide range of content relating to information, opinion and entertainment. Without information about online undertakings that transmit or retransmit podcasts, it would be more difficult for the Commission to ensure the achievement of the objectives of subparagraph 3(1)(i)(iv) of the *Broadcasting Act*, which relate to, among other things, providing a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and of subparagraph 3(1)(i)(i), pursuant to which the programming provided by the Canadian broadcasting system should be varied and comprehensive, providing a balance of information, enlightenment and entertainment for people of all ages, interests and tastes.

317. Given that podcasts constitute a quickly evolving type of content that is consumed by Canadians, requiring online undertakings that transmit or retransmit podcasts over the Internet and that are subject to the *Broadcasting Act* to comply with the conditions of service would assist the Commission in improving its understanding of that type of content in order to ensure that the broadcasting system is working to achieve the identified objectives of the *Broadcasting Act*.

318. In light of the above, the Commission finds that it would not be appropriate to exclude from the application of the conditions of service all online undertakings that transmit or retransmit podcasts that are subject to the *Broadcasting Act*. The Commission notes that those undertakings that only provide podcasts that are not subject to the *Broadcasting Act*, as discussed above, are consequently not subject to the conditions of service in the first place. The Commission also notes that other online undertakings that transmit or retransmit podcasts will be excluded from the application of the conditions of service where their revenues fall below the threshold.

Audiobooks

Positions of parties

319. According to the DiMA, online services that broadcast audiobooks should be excluded from the conditions of service.

320. According to Spotify and the ITIC, audiobooks are “books” and not “broadcasting” or “programs”. They noted that audiobooks have never been the object of Commission regulation, and submitted, as a matter of principle, that they should not be. Spotify argued that traditional print and digital book publishing lie outside the scope of the *Broadcasting Act*, that the regulation of audiobooks was not contemplated by amendments to the *Broadcasting Act* following the coming into force of the *Online Streaming Act*, or by legislators in Parliament, and that any such regulation would not be constitutionally sound.

Commission's decision

321. Based on the definition of "program" in the *Broadcasting Act*, audiobooks are technically audio programs, and their transmission by means of the Internet for reception by the public by means of, for example, computers, tablets or phones, constitutes broadcasting. Accordingly, the transmission or retransmission of audiobook services over the Internet could be considered an online undertaking.

322. However, audiobooks are generally reproductions, in audio form, of works that have been published in print or digital format. Services offering books, in any format, have never been regulated by the Commission, and, unlike with transactional video content discussed above, there is no parallel for such a service within the traditional broadcasting system. As such, the Commission considers that requiring online undertakings that provide such services to be subject to the conditions of service would not contribute in a material manner to the implementation of the broadcasting policy set out under the *Broadcasting Act*.

323. In light of the above, the Commission considers that online undertakings whose single activity and purpose consists of providing audiobook services should not be subject to the conditions of service. Further, the Commission will exclude revenues derived from audiobook services from the definition of "annual revenues" used to determine whether an undertaking is subject to the conditions of service.

324. Finally, similarities between audiobooks and other spoken word programs could blur the line between excluded and non-excluded services. To ensure a distinction between audiobooks and other spoken word programs, the Commission defines "audiobook," in the order, as an audio program that reproduces a text, published in print or digital format, that has an International Standard Book Number.

325. The Commission will continue to monitor this sector as it evolves.

Revenue calculation method

326. In the appendix to the Notice, the Commission set out the following definition of "annual revenues":

> **Annual revenues** means revenues attributable to the person or that person's subsidiaries and/or associates, if any, collected from the Canadian broadcasting system across all services during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year for which the revenue calculation is being filed), whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings. This includes online undertakings that operate in whole or in part in Canada and those that collect revenue from other online undertakings by offering bundled services on a subscription basis. The Commission will accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

327. Certain interveners proposed amendments to the definition of “annual revenues”. The CAB and Quebecor, along with the FCCF and the CPSC-SCFP, proposed replacing the phrase “annual revenues” with “annual gross revenues,” to capture the total revenues of an undertaking. While the Commission considers that the definition is appropriate as only “annual revenues” and not “annual Canadian gross revenues” must be defined, it also considers that, for the purpose of clarity, it would be appropriate to amend the defined expression to read “annual Canadian gross revenues”. Accordingly, the Commission has amended the order so that the defined expression is “annual Canadian gross revenues.”

328. Roku proposed amending the definition of “annual revenues” to specify that the revenues are collected from **regulated broadcasting services** of online undertakings in Canada (proposed amendment in bold). The Commission notes, however, that only revenues from broadcasting activities of broadcasting undertakings are included in the amended definition of “annual revenues”. Accordingly, the Commission finds that it is not necessary to amend the definition as proposed by the intervener.

329. SiriusXM submitted that “annual revenues” should be revenues that an online undertaking earns from broadcasting activities that determine their ability to materially contribute to the broadcasting system. In the Commission’s view, the issue here is whether the compliance with the conditions of service will contribute in a material manner to the implementation of the broadcasting policy set out in the *Broadcasting Act*, not whether the broadcasting activities of particular online undertakings do so. SiriusXM’s proposal would also require the Commission to assess content of individual programs, which it aims to avoid doing by not exempting services based on specific format. Accordingly, the Commission finds that it would not be appropriate to adopt SiriusXM’s proposal.

330. The FRPC submitted that if undertakings are owned by more than one entity, the definition of “annual revenues” should ensure that revenues are attributed to the appropriate owner to avoid double-counting and overestimation of revenues. It added that the same definition should be used across all broadcasters, and that the Commission should clarify how and on what basis it plans to attribute revenues and how those revenues will be audited to ensure full disclosure. In this regard, the Commission notes that the revenues of all of the operators that are affiliated are included for the calculation of the revenues of the broadcasting ownership group, regardless of their ownership structure. Accordingly, the Commission clarifies that revenues of an operator cannot be split amongst several shareholders.

331. The FRPC also questioned the use of the phrase “will accommodate” in the last sentence of the definition, and expressed concern over the Commission fettering its jurisdiction by committing to accommodate all requests for alternative reporting periods. Rogers, however, requested that the flexibility to use alternative reporting periods not be applied on a case-by-case basis, but instead extend to all online undertakings and eventually all licensed undertakings as well. In the Commission’s view, amending the definition would be appropriate as the Commission should retain flexibility on this matter. Accordingly, the last sentence of the definition of “annual revenues” will read as follows: “The Commission may accommodate

requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years."

332. Finally, Rogers and the CAB submitted that the definition to be adopted should clarify the applicable period for determining annual revenues for the purpose of determining exemption status. In this regard, Rogers proposed the following change to the Commission's proposed definition (in bold): "[…] during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year **within ~~for~~** which the revenue calculation is being filed) […]." To illustrate the potential confusion, Rogers explained that it assumed the conditions of service and exemption from those conditions would come into effect on 1 September 2023. Pursuant to the language in the Commission's proposed definition, online undertakings would be exempted from the conditions of service based on the revenues earned in Canada during the broadcast year ending on 31 August 2022. Rogers assumed the Commission's intention is that the conditions of service apply to undertakings based on the revenues generated during the broadcast year ending on 31 August 2023. In regard to the above, the Commission notes that online undertakings must file the information based on the revenues of the preceding broadcast year. Accordingly, the Commission will amend the definition of "annual revenues" as proposed by Rogers, such that the information must be based on the revenues of the preceding broadcast year.

333. Interveners also commented on types of revenues and contributions that should be taken into consideration when determining the annual revenues of an undertaking. These are addressed in the following sections.

Revenues derived from social media services

334. In line with its proposal to exclude social media services from the conditions of service, TikTok proposed exempting revenues from social media services. For these services, it proposed instead an approach that identifies the revenues to be included, rather than which specific revenues are to be excluded.

335. Given the Commission's decision not to exclude social media services from the conditions of service, it is necessary to determine those revenues that must be included by online undertakings that provide social media services in calculating the $10 million revenue threshold for the conditions of service.

336. For the reasons discussed above, the Commission does not consider that all of the revenues of a social media service should be excluded, as proposed by some interveners. While it would be inappropriate at this stage to make any fundamental policy decision regarding social media services, the Commission considers that it is essential to provide guidance regarding which revenues are to be included for the calculation of "annual revenues".[64]

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[64] Where the online undertaking's broadcasting activities only consist of these types of programs, the online undertaking itself is not subject to the *Broadcasting Act* under subsection 4.1(3) of that Act, and thus would not be subject to the Registration Regulations in the first place.

337. With the above in mind, it is the Commission's view that the revenues of social media services derived from their own broadcasting activities, which could include, for example, advertising[65] or subscription revenues, should form part of those services' annual revenues as these activities would not be excluded from regulation.

338. The Commission intends to undertake a broader analysis of social media, social media creator and social media services over the course of other, future proceedings. Further, the Commission will continue to monitor the development of the regulatory environment of social media services and the utilization of these platforms by actors of the broadcasting system.

339. In light of the above, the Commission confirms that the revenues of online undertakings that provide social media services and that are derived from their own broadcasting activities, such as advertising revenues or subscription revenues, will be included in the calculation of their annual Canadian gross revenues from broadcasting activities for the purpose of determining the applicability of the conditions of service.

Contributions made to third parties

340. According to Spotify, who noted that it allocates a significant portion of its revenues to the payment of royalties, gross revenues may not be the best metric for determining exemption status given that it is distorted and disadvantages them against other online undertakings. The intervener noted that nearly 70% of its music revenues are passed through to rights holders who engage in the production of content and who compensate artists and writers. It added that by providing significant support to Canada's music ecosystem, royalty payments make important contributions to Canadian broadcasting. Spotify noted that if gross revenues serve as the metric for determining exemption status, it would be placed in the same category as other undertakings with different cost structures.

341. Tubi proposed excluding annual expenditures attributed to licensing and acquiring content from Canadian producers and distributors, as well as the amounts spent to finance film and television series created by Canadian producers and distributors.

342. ACCORD opposed this type of exclusion. Noting that royalties are paid by all broadcasting undertakings who use the work of rightsholders, it submitted that such royalties are the cost of doing business. It added that royalties, which are a matter of copyright law, are different than contributions to the system, which are not based on a broadcasting undertaking's profits.

343. Rogers, noting that its traditional services pay millions of dollars to rightsholders, opposed such exclusions until the Commission undertakes a broader review of the

[65] This means that any advertising uploaded by the social media service that falls into the definition of "program" and that appears, for example, on a user feed in social media services, would be included. It also includes advertising added by the social media service to another program uploaded by a user, such as advertising added at the beginning or in the middle of a program uploaded by a user.

regulatory treatment of the programming expenditures of traditional broadcasting undertakings, and of royalty and licensing payments. Corus agreed and proposed that the Commission conduct a broader discussion of the issue encompassing all broadcasting undertakings. SiriusXM stated that if the Commission were to exclude royalties, it would expect the Commission to rebalance the regulatory framework.

344. The Commission acknowledges that different services have different business models and different costs structures. However, allowing, for the purpose of calculating the revenue threshold, audio streaming services to deduct royalties from their revenues or video services to deduct wholesale payments from their revenues would be inequitable since this would effectively allow deductions from revenues that are not allowed for traditional media, such as radio and television stations. Accordingly, the Commission finds that it would not be appropriate to allow online services to claim those deductions for the purposes of calculating the revenue threshold for determining the applicability of the conditions of service.

345. Further, adding "not otherwise accounted for" in the definition of "annual revenues" as proposed by Corus may allow BDUs to deduct expenses paid to broadcasting services from their revenues, which again is inconsistent with the Commission's current practice. Accordingly, the Commission finds that it would not be appropriate to amend the definition as proposed by Corus.

Revenues derived from exempt services

346. The MPAC submitted that revenues from exempt services or content excluded from regulation should be excluded from the definition of annual revenues. TikTok argued that Canadian gross revenues from broadcasting activities that count towards the threshold for exclusion from the application of the conditions of service should be limited to revenues from activities that are subject to regulation and should not include exempt services or programs. Similarly, Spotify stated that only revenues from services that are subject to the Commission's regulatory framework should be included in the definition of "annual revenues," and that services that lie outside of the Commission's scope or are otherwise subject to exemption (including as a result of the present proceeding) should be excluded.

347. Google agreed with Spotify's approach, and submitted that "annual revenues" should itself explicitly exclude revenue from exempt services or content directed to be excluded from regulation.

348. As noted above, several services are currently exempt from licensing requirements and regulations made by the Commission[66] under Part II of the *Broadcasting Act*.[67] These undertakings have been exempted on the grounds that compliance with the

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[66] For examples of regulations made by the Commission, see the *Broadcasting Licence Fee Regulations, 1997*, the *Broadcasting Distribution Regulations*, the *Discretionary Services Regulations*, the *Radio Regulations, 1986*, and the *Television Broadcasting Regulations, 1987*.

[67] A full list of exempted services is available on the Commission website. Of note, these services include small services, but also certain VOD services such as hybrid VOD services (Crave and Illico) (see Broadcasting Regulatory Policy 2015-355 and Broadcasting Order 2015-356).

Commission's requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*. Accordingly, the Commission considers that it would not be appropriate to include the revenues from these exempt undertakings in the calculation of annual revenues.

349. In light of the above, the Commission finds that, in addition to revenues of online undertakings, only the revenues of licensed broadcasting undertakings should be included in the definition of annual revenues. In this regard, the Commission notes that the definition of "annual revenues" refers to traditional broadcasting undertakings. Given that there is no definition for the term "traditional," the Commission will replace "traditional broadcasting undertakings" with "licensed broadcasting undertakings".

350. Also in this regard, the Commission has amended the definition of "excluded revenue" by including revenue derived from broadcasting activities by broadcasting undertakings that are exempt from licensing requirements, or all regulations made under Part II of the *Broadcasting Act*, unless, in either case, otherwise specified in the order providing for such exemption.

Revenues derived from licensing fees

351. AMC proposed that revenues associated with royalties or other licensing fees collected in the context of business-to-business licensing arrangements, whereby an online undertaking licenses content to a third-party online undertaking for distribution by that third party to its own Canadian consumers, should be excluded from the calculation of annual revenues for the purpose of calculating the threshold for the application of the conditions of service.

352. The Commission confirms that its long-standing practice is to exclude revenues derived from licensing fees from the calculation of broadcasting revenues.

Revenues derived from non-Canadian services authorized for distribution in Canada

353. AMC and the MPAC submitted that revenues derived from a non-Canadian service authorized for distribution in Canada should be excluded from the definition of "annual revenues". The CMPA, however, opposed this position on the grounds that the revenues involved are generated in Canada and are paid by Canadian customers/subscribers. It added that this would establish an inequitable regulatory framework in favour of services like AMC to the disadvantage of other, largely Canadian services operating in that same market.

354. The Commission notes that there are no changes required, as non-Canadian services authorized for distribution in Canada are not licensed under the *Broadcasting Act*. Accordingly, revenues of these services will not be included in the definition of "annual Canadian gross revenues" for the purpose of calculating the threshold for the application of the conditions of service.

Other revenues

355. According to the PBS, “gross revenues” should not include monies received in the form of donations, non-profit pledge drives, government appropriations, memberships to non-profit organizations, or non-commercial underwriting. It submitted that the revenue threshold should only capture Canadian broadcasting revenues. This view was supported by Spotify. Rogers, however, opposed this proposal on the grounds that memberships to non-profit organizations are largely analogous to subscription fees charged by for-profit undertakings.

356. The Commission’s practice is to include other revenues such as donations, non-profit pledge drives, government appropriations and memberships to non-profit organizations as part of the revenue calculation, and notes that no compelling evidence has been provided to change this practice. Accordingly, the Commission does not consider that it would be appropriate to exclude such other revenues from its definition of “annual revenues”.

Inclusion only of revenues derived from broadcasting activities

357. The definition of “annual revenues” set out in the proposed order specifies revenues “collected from the Canadian broadcasting system.” The CAB proposed adding a phrase to the proposed definition to specify that the revenues are collected from broadcasting activities of an online undertaking collected from the Canadian broadcasting system. Rogers put forward a similar proposal and argued that the current definition, as worded above, might be interpreted to extend beyond an online undertaking’s broadcasting activities in Canada. Google submitted that “annual revenues” should only include those of services that are appropriately in scope of the Commission’s authority to regulate (i.e., revenues “derived from broadcasting activities”). Other interveners, including Corus and the FCCF, supported adding the term “broadcasting activities” to the definition of annual revenues.

358. Roku relied on its submission in response to Broadcasting Notice of Consultation 2023-139, which proposed revising the proposed definition of “annual revenues” to clarify that revenues not derived from broadcasting undertakings within the meaning of the *Broadcasting Act* are not to be counted for the purposes of the threshold for exclusion from the application of the conditions of service. It argued that this would provide organizations with certainty that the portions of the business that are not broadcasting undertakings within the meaning of the *Broadcasting Act* will not have their revenues added to the calculation, and that revenues not derived from the Canadian broadcasting system will not be added to the calculation.

359. The Commission acknowledges that the proposed definition of “annual revenues” appears to be ambiguous and might erroneously be interpreted as including revenues from business related to the broadcasting system that is not regulated by the *Broadcasting Act*. In the Commission’s view, the use of the expression “derived from broadcasting activities” would be more appropriate. Accordingly, the Commission has amended the definition of “annual revenues” to specify that they only include revenues derived from broadcasting activities.

Revenues derived from the selling or the leasing of software and hardware

360. Roku submitted that the Commission should exclude from the calculation of annual revenues those revenues that are not derived from broadcasting, such as those from hardware and software interfaces like connected televisions and the Roku OS. In its view, the Commission should adopt a definition of annual revenues consistent with the scope of the *Broadcasting Act* and the activities it regulates.

361. Rogers opposed Roku's proposal on the grounds that the definition of "gross revenues from broadcasting activities" that applies to BDUs includes "gross revenues from basic and discretionary service subscriptions, additional outlets, installation and reconnections fees, set-top box sales and rentals, commercial messages, as well as revenues from the operators of exempt programming undertakings such as home shopping and real estate services." Rogers added that when software interfaces are used to generate revenue associated with advertising, they are transmitting programming and, therefore, are broadcasting within the meaning of the *Broadcasting Act*.

362. The Commission notes that revenues derived from non-broadcasting activities are not covered by the definition of "annual revenues". However, revenues derived from the rental of set-top boxes are covered by the definition of revenues for the purpose of calculating the regulatory obligations of traditional BDUs. In the Commission's view, to ensure regulatory symmetry between traditional and online services, it would be appropriate for revenues derived from the selling or renting of software and hardware for the purpose of allowing a customer to access programs, and that are integral to the provision of the broadcasting service, to also be covered by the definition of "annual revenues".

363. The Commission further notes the evolving nature of hardware and software that are integral to the provision of the broadcasting service, and acknowledges that the types of hardware that allow a customer to access programs are extremely broad and could arguably include, among other things, mobile devices and computers. It is not the Commission's intent to include revenues from these devices as part of the definition of annual revenues. In the Commission's view, the hardware and software revenues that should be included in annual revenues are those of the hardware and software that are designed primarily for the purpose of allowing a customer to access a specific broadcasting service and that are integral to the provision of that service.

364. In light of the above, the Commission finds that revenues derived from the selling or the leasing of software and hardware designed primarily for the purpose of allowing a customer to access a specific broadcasting service, and that are integral to the provision of that service, are to be included in the calculation of "annual Canadian gross revenues".

Conditions of service

365. The specifics of the various conditions of service identified above at paragraphs 74, 87, 103 and 123 are set out in Broadcasting Order 2023-332, set out in Appendix 1 to this regulatory policy. This Order is made pursuant to subsection 9.1(1) of *Broadcasting Act*, having been published on the Commission's website as part of the Notice, and a reasonable opportunity has been given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission consistent with subsection 9.1(4).

Secretary General

Related documents

- Online Undertakings Registration Regulations*, and exemption order regarding those regulations*, Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330, 29 September 2023
- *Call for comments – Proposed new* Broadcasting Fees Regulations, Broadcasting Notice of Consultation CRTC 2023-280, 23 August 2023
- *Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings*, Broadcasting Notice of Consultation CRTC 2023-140, 12 May 2023
- *Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations*, Broadcasting Notice of Consultation CRTC 2023-139, 12 May 2023
- *Notice of hearing – The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*, Broadcasting Notice of Consultation CRTC 2023-138, 12 May 2023
- *Guidance on the current* Broadcasting Act *and the transitional provisions of the* Online Streaming Act, Broadcasting Information Bulletin CRTC 2023-137, 12 May 2023
- *Annual Digital Media Survey*, Broadcasting Regulatory Policy CRTC 2022-47, 23 February 2022
- *Standard requirements for on-demand services*, Broadcasting Regulatory Policy CRTC 2017-138, 10 May 2017
- *Policy framework for local and community television*, Broadcasting Regulatory Policy CRTC 2016-224, 15 June 2016
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015

- *Revised exemption order for certain classes of video-on-demand (VOD) undertakings and updated standard conditions of licence for licensed VOD undertakings*, Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order CRTC 2015-356, 6 August 2015

- *Let's Talk TV – A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015

- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012

- *Amendments to various regulations – Implementation of the regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2012-407, 26 July 2012

- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011

- *Exemption order for small video-on-demand undertakings*, Broadcasting Order CRTC 2011-60, 31 January 2011

- *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, Broadcasting Public Notice CRTC 2003-10, 6 March 2003

- *Policy Governing the Distribution of Video Games Programming Services*, Public Notice CRTC 1995-5, 13 January 1995

Appendix 1 to Broadcasting Regulatory Policy CRTC 2023-331

Broadcasting Order CRTC 2023-332

Conditions of service for carrying on certain online undertakings

The Commission hereby orders, pursuant to subsection 9.1(1) of the *Broadcasting Act*, certain online undertakings as described herein to comply with the following conditions.

Interpretation

The following definitions apply in this order.

Annual Canadian gross revenues means total revenues attributable to the person or that person's subsidiaries and/or associates, if any, derived from Canadian broadcasting activities across all services during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year within which the revenue calculation is being made), whether the services consist of services offered by licensed broadcasting undertakings or by online undertakings. This includes online undertakings that operate in whole or in part in Canada and those that receive revenue from other online undertakings by offering bundled services on a subscription basis. The Commission may accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

Audiobook means an audio program that reproduces a text, published in print or digital format, that has an International Standard Book Number.

Audiobook service means the transmission or retransmission of audiobooks over the Internet for reception by the public by means of broadcasting receiving apparatus.

Broadcast year means the period beginning on 1 September of a calendar year and ending on 31 August of the following calendar year.

Broadcasting ownership group means a group of all operators that are affiliates of one another.

Excluded revenue means revenue derived from providing video game services or audiobook services as well as revenue derived from broadcasting activities by broadcasting undertakings that are exempted from licensing requirements, or all regulations made under Part II of the *Broadcasting Act* unless, in either case, otherwise specified in the exemption order.

Operator means a person that carries on a broadcasting undertaking to which the *Broadcasting Act* applies.

Video game means an electronic game that involves the interaction of a user by means of an Internet connected device, where the user is primarily engaged in active interaction with, as opposed to the passive reception of, sounds or visual images, or a combination of sounds and visual images.

Video game service means the transmission or retransmission of video games over the Internet for reception by the public by means of broadcasting receiving apparatus.

Application

The conditions of service set out in this Order apply to all persons carrying on online undertakings with the following exceptions:

The conditions of service set out in this Order do not apply to persons carrying on broadcasting undertakings defined by any of the following two classes:

(i) online undertakings whose single activity and purpose consists of providing video game services;

(ii) online undertakings whose single activity and purpose consists of providing audiobook services;

With the exception of condition of service 1 (information gathering), the conditions of service set out in this Order also do not apply to persons carrying on broadcasting undertakings defined by any of the following two classes:

(i) online undertakings whose operator forms part of a broadcasting ownership group that has, after deducting any excluded revenue, annual Canadian gross revenues of less than $10 million; or

(ii) online undertakings whose operator does not form part of a broadcasting ownership group, that have, after deducting any excluded revenue, annual Canadian gross revenues of less than $10 million.

Condition of Service – Information Gathering

1. The online undertaking shall provide, in such form and at such time as requested by the Commission:[68]

    (a) information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;

[68] The financial filing requirements set out in *Annual Digital Media Survey*, Broadcasting Regulatory Policy CRTC 2022-47, 23 February 2022, continue in effect, with their own revenue thresholds of $50 million for audiovisual online undertakings and $25 million for audio online undertakings.

(b) information, that is in the undertaking's possession, custody or control, regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations or subscribership, or financial information about broadcasting in Canada;

(c) information regarding the undertaking's adherence to the conditions of service, the *Broadcasting Act*, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and

(d) a response to a complaint filed with regard to broadcasting in Canada.

Condition of Service – Undue Preference

2. The online undertaking shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

Condition of Service – Availability of Content

3. All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific mobile service~~,~~ or retail Internet access service.

Condition of Service – Fee Return

4. (a) If requested by the Commission, the online undertaking shall, on or before 30 November each year, file a fee return, on the form provided by the Commission and containing the information required in the form for the broadcast year, for the one-year period beginning 1 September of the year preceding the calendar year in which the return is required to be filed.

(b) For the purposes of paragraph (a), fee revenue, in respect of an online undertaking, means the annual Canadian gross revenues minus excluded revenue derived during a broadcast year from the Canadian broadcasting activity of the online undertaking, or by an affiliate to the operator of that online undertaking, and, without limiting the generality of the foregoing, includes

(i) the annual Canadian gross revenues, as reported by the online undertaking and validated by the Commission, where the undertaking has not filed a fee return covering 12 months of the most recently completed return year; or,

(ii) if such information is not available, the annual Canadian gross revenues that, based on the trends of the market in which the undertaking operates, its business plan and its previous financial performance, the Commission considers to be related to its broadcasting activity.

This definition does not include any amount received by an online undertaking from another broadcasting undertaking to which this condition of service or the *Broadcasting Licence Fee Regulations, 1997* apply, other than the amounts received from the Canadian Broadcasting Corporation for the sale of airtime.

(c) This condition will be of no force or effect 30 days after any amendments to the *Broadcasting Licence Fee Regulations, 1997*, or new broadcasting fee regulations, come into effect.

Appendix 2 to Broadcasting Regulatory Policy CRTC 2023-331

Terms and conditions of the exemption order for video-on-demand undertakings

By this order and pursuant to subsection 9(4) of the *Broadcasting Act* (the Act), the Commission exempts from the requirements of Part II of the Act and any regulations made thereunder those persons carrying on broadcasting undertakings of the classes defined by the criteria set out below.

Purpose

The purpose of these television programming undertakings is to provide on-demand programming services that may be distributed by broadcasting distribution undertakings.

A. General

1. For the purpose of this order, the following definitions apply:

   "television programming" means programming designed primarily for conventional television, discretionary programming services or licensed video-on-demand services.

   "terms of carriage" means the rates, terms and conditions pursuant to which a programming service is provided by one broadcasting undertaking to another.

2. The Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council.

3. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

4. The undertaking files information with the Commission specifying: the name of the service provider, the name under which the service operates, the broadcasting distribution undertaking(s) that distribute the service and the service's contact information, including mailing address, telephone number, fax number, email address and website. In the case of a new undertaking, the above information is filed with the Commission when the undertaking is ready to commence operations. The undertaking will advise the Commission if there are any changes to this information.

5. The undertaking submits any information requested by the Commission to ascertain the undertaking's compliance with the terms of this order.

6. The undertaking does not distribute programming that contains the following:

   (a) anything that contravenes any law;

   (b) any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

   (c) any obscene or profane language or pictorial representation; or

   (d) any false or misleading news.

   For the purpose of section (b), sexual orientation does not include the orientation towards a sexual act or activity that would constitute an offence under the *Criminal Code.*

7. The undertaking shall adhere to the *Equitable Portrayal Code*, as amended from time to time and approved by the Commission.

8. The undertaking shall adhere to the *Pay television and pay-per-view programming code regarding violence*, as amended from time to time and approved by the Commission.

9. The undertaking shall adhere to the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, as amended from time to time and approved by the Commission.

B. Small video-on-demand undertakings

10. The undertaking is owned and operated by a person that does not hold a broadcasting distribution licence and is not an affiliate of a person that holds a broadcasting distribution licence (licensee). An “affiliate” means a person who controls the licensee or who is controlled by the licensee or by a person who controls the licensee.

11. The undertaking provides video-on-demand services that are distributed using only the facilities of exempt broadcasting distribution undertakings operating pursuant to the exemption order set out in *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Order CRTC 2009-544, 31 August 2009, as may be amended from time to time.

C. Hybrid video-on-demand undertakings

12. If the undertaking does not meet the criteria set out in paragraphs 10 and 11 above, the undertaking offers its service over a broadcasting distribution undertaking provided that all of the programs for which the rights are held on an exclusive basis are also delivered and accessed over the Internet.

13. Where the service is delivered and accessed over the Internet as described in paragraph 12 above, it shall not be offered in a way that is dependent on a subscription to any specific broadcasting distribution undertaking, mobile service or retail Internet access service.

14. The undertaking shall provide, in such form and at such time as requested by the Commission:

    (a) information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;

    (b) information, that is in the undertaking's possession, custody or control, regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations or subscribership, or financial information about broadcasting in Canada;

    (c) information regarding the undertaking's adherence to the conditions of service, the *Broadcasting Act*, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and

    (d) a response to a complaint filed with regard to broadcasting in Canada.

15. In regard to the filing of information with the Commission:

    (a) The undertaking files information with the Commission specifying: the name of the service provider and the owner or owners (i.e. the person who controls the service provider, if different from the service provider), the name under which the service operates, the service's contact information, including mailing address, telephone number, fax number, email address, website, the name of any broadcasting distribution undertaking to which the service is related and the operating language(s) of the service. In the case of a new undertaking, the above information is filed with the Commission at least 30 days before the service is first distributed.

    (b) The undertaking updates with the Commission the information required under (a) above prior to making any change.

    (c) By 30 November of each year, the undertaking submits to the Commission all information required as part of the simplified annual return for such undertakings.

D. Obligation during dispute

16. If there is a dispute concerning the carriage or terms of carriage of programming or concerning any other right or obligation under the Act, the undertaking shall continue to provide access to the programming services on the same terms of carriage as it did before the dispute.

17. For purposes of paragraph 16, a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

E. Dispute Resolution

18. If there is a dispute concerning any aspect of the terms of carriage, one or both of the undertakings to the dispute may refer the matter to the Commission for dispute resolution and the undertakings to the dispute submit to any decision that may result therefrom.

19. If the Commission accepts a referral of a matter for dispute resolution, the undertaking submits to participation in a mediation before a person appointed by the Commission.

20. Where the undertaking provides another undertaking with access to television programming in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the undertaking submits to:

    (a) having the dispute resolved as provided for in *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, as amended from time to time; and

    (b) the terms of carriage established by the Commission as of the date the programming was first made available to the relevant undertaking absent a commercial agreement and on a going-forward basis for the contractual term established by the Commission.

21. For greater certainty, nothing in paragraphs 18 or 20 prevents parties from reaching an agreement with respect to rates, terms or conditions that differ from those established by the Commission.

22. During dispute resolution, the undertaking submits to produce and file such additional information as may be requested by the Commission or any individual named by the Commission to act as a mediator in a given dispute.